89-1146

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

THOMAS E. BROECKL, JAMES A. BROWN AND ROBERT D. PHELPS III, INDIVIDUALLY, AND ON BEHALF OF THOSE SIMILARLY SITUATED,

Petitioners,

v.

THE CHICAGO PARK DISTRICT, A UNIT OF LOCAL GOVERNMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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QUESTIONS PRESENTED

Whether the State of Illinois can discriminate between certain of its citizens in their use of facilities the state holds in trust for all its citizens where such discrimination is based solely on where the citizens live and there are no additional burdens imposed on the state. (Residency Discrimination)

Whether the State of Illinois can allow one of its subdivisions, which holds special facilities in trust for all citizens of the state, to license for revenue to benefit only the citizens residing in the subdivision. (Public Trust Doctrine)

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

Petitioners, who were plaintiffs and appellants in the courts below, are Thomas J. Broeckl, James A. Brown and Robert D. Phelps. Plaintiffs were certified by the trial court as representatives of a class consisting of all persons, individuals or other entities (i.e. mooring owners-holders) who paid mooring or docking fees to the Chicago Park District, directly or indirectly.

Respondent Chicago Park District was the defendant in the trial court, cross-appellant/appellee in the appellate court and appellee in the Illinois Supreme Court.

Two amici appeared in the Illinois Supreme Court: The Illinois Municipal League and The Illinois Association of Park Districts.

The Attorney General of the State of Illinois has not appeared in these proceedings, but has been served with this petition pursuant to Rule 28.4(c), and 28 U.S.C. Section 2403(b) may be applicable.

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Petitioners,

v.

THE CHICAGO PARK DISTRICT, A UNIT OF LOCAL GOVERNMENT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Thomas J. Broeckl, James A. Brown and Robert D. Phelps individually and on behalf of the certified class respectfully petition for a writ of certiorari to review the judgment of the Illinois Supreme Court in this case.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (App. A, 1a-13a) is reported at ___ Ill.2d ___, 544 N.E.2d 792. The opinion of the Appellate Court of Illinois for the First

District (App. B, 14a-23a) is reported at 170 Ill.App.3d 1063, 524 N.E.2d 1045. The opinion of the trial court granting summary judgment and certifying the class (App. C, 24a-28a) is unreported.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on September 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a) (validity of a State statute challenged under federal Constitution).

STATUTORY PROVISIONS INVOLVED

United States Constitution

Article IV, Sec. 2

> Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.
>
> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.
>
> No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Amendment XIV

Section 1. All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Illinois

Article I, Section 2

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Article VII, Section 1

"Municipalities" means cities, villages and incorporated towns. "Units of local government" means counties, municipalities, townships, special districts, and units, designated as units of local government by law, which exercise limited governmental powers or powers in respect to limited governmental subjects, but does not include school districts.

Article VII, Section 6(e)

A home rule unit shall have only the power that the General Assembly may provide by law (1) to punish by imprisonment for more than six months or (2) to license for revenue or impose taxes upon or measured by income or earnings upon occupations.

Article VII, Section 8

Townships, school districts, special districts and units, designated by law as units of local government, which exercise limited governmental powers or powers in respect to limited governmental subjects shall have only powers granted by law. No laws shall grant the power (1) to any of the foregoing units to incur debt payable from ad valorem property tax receipts maturing more than 40 years from the time it is incurred, or (2) to make improvements by special assessments to any of the foregoing classes of units which do not have that power on the effective date of this Constitution. The General Assembly shall provide by law for the selection of officers of the foregoing units, but the officers shall not be appointed by any person in the Judicial Branch.

Article IX, Section 2

In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly.

Illinois Revised Statutes

Ch. 105, Section 8-1(h)

Every park district shall, from the time of its organization, be a body corporate and politic by such name as set forth in the petition for its organization or such name as it may adopt under Section 8-8 hereof and shall have and exercise the following powers:

(h) to establish fees for the use of facilities of the district. Fees charged non-residents need not be the same as fees charged to residents of the district.

Ch. 105, Section 333.19

Sec. 19. The Chicago Park District Commission is empowered to levy and collect a general tax on the property in the park district for necessary expenses of said district for the construction and maintenance of the parks and other improvements hereby authorized to be made, and for the acquisition and improvement of lands herein authorized to be purchased or acquired by any means provided for in this Act.

Ch. 105, Section 333.23n(g)

The Chicago Park District, to carry out the purposes of this section, has all the rights and powers over its harbor as it does over its other property, and its rights and powers include but are not limited to the following:

* * *

(g) To establish and collect fees for all facilities and services, and compensation for materials furnished. Fees charged non-residents of such district need not be the same as fees charged to residents of the district.

Ch. 105, Section 333.23p

Sec. 26.5. All right, title and interest of the State of Illinois in and to submerged lands, naturally and artificially made or reclaimed lands, both within the boundaries of the harbor and adjoining its outer or water side, are vested in the Chicago Park District for harbor and other public purposes, and the same shall be a part of the public park under the jurisdiction of the Chicago Park District. The harbor, and all real and personal property connected therewith,

owned and operated by the Chicago Park District under the provisions of this section are exempt from taxation.

Chicago Park District Code

Section 30.8

Fees for use of park facilities.

The park board or the general superintendent may fix and collect reasonable fees for the use of park facilities. Such fees may be fixed at a uniform rate to all users of such facility or facilities.

STATEMENT OF FACTS

This is a class action, where the class has been certified as all mooring permit holders, and is comprised of approximately 5,000 members. The complaint that was filed alleged that the fees collected by the Chicago Park District (hereinafter sometimes referred to as the "CPD") for moorings violated the plaintiffs' rights to due process and equal protection under the United States Constitution, the Illinois Constitution, were in violation of the Public Trust Doctrine and contrary to Illinois Statutes. (Complaint Restated To Include Amendments, App. D, 29a-38a)

Since 1975, the Chicago Park District has charged fees for mooring permits that are greatly in excess of the expenses incurred in providing those facilities. Over the period 1979-1983, the Park District made a profit on mooring permit fees totaling $10,754,938.00. (R. 430) The Park District also charged non-residents a greater fee (i.e. 25% surcharge) than residents. (R. 482)

Typical of the overcharge is the following table taken from an affidavit filed by the Park District (R. 245):

Year	Revenue	Expenses	Dollar Surplus	Percent Profit
1981	$2,750,887	$463,675	$2,287,212	590%
1982	3,296,955	507,769	2,789,186	649%
1983	3,536,923	505,306	3,031,617	699%
1984	3,400,000	577,597	2,822,403	588%
		TOTAL:	$10,930,418	

AVERAGE YEARLY PERCENTAGE
AND DOLLAR PROFIT
PROFIT 631% = $2,732,609

The record shows, the CPD admitted and the Supreme Court confirmed, that the cost of providing moorings to non-residents is the same as the cost for providing moorings for residents of Chicago; no additional burdens are imposed on the Park District in its furnishing moorings to non-residents. (App. A, 3a)

Both sides filed motions for summary judgment. Plaintiffs' motion (R. 184) was for partial summary judgment on liability only, with damages being left for later determination. Defendant's motion (R. 114) was for complete summary judgment.

The trial court found as follows in connection with the motions:

> "1. The Chicago Park District has conceded it makes a profit from 100 to 500 per cent on the fees charged boat owners (the fees) for the privileges of mooring their boats in the Park District administered facilities.
>
> 2. The aforesaid fees charged by the Park District exceed the cost of furnishing the services

supplied by the Park District in the operation of harbors.

3. Non-residents of the Chicago Park District have been charged a 25 per cent higher fee than residents of the Chicago Park District for the same services; this artificial distinction between resident and non-resident is discriminatory, arbitrary, capricious and unreasonable." (App. C, 25a)

The trial court held, however, that the Park District "has a right to charge such fees as the yachtsman will pay and use excess funds to subsidize other Park District facilities." (App. C, 25a) The trial court also held that use of such fees to subsidize other Park District facilities and services was "a proper and appropriate use of the funds." (App. C, 27a)

The trial court did strike down the non-resident surcharge, and the state statute purportedly authorizing it, Ill. Rev. Stat. ch. 105, Section 333.23n(g), holding it to be unconstitutional and void. (App. C, 27a)

On appeal, the appellate court affirmed the trial court's grant of summary judgment to the defendant on the illegal fee claim and reversed the trial court's holding that Illinois Revised Statute Ch. 105, Section 333.23n(g) was unconstitutional. The Illinois Supreme Court affirmed the appellate court holding that the plaintiffs' use of public harbors located in Chicago was not protected under either the United States or Illinois equal protection clauses since there was no fundamental rights involved (App. A, 10a), and further held that the Public Trust Doctrine did not apply to the non-resident surcharge for the use of the harbors. (App. A, 12a)

REASONS FOR GRANTING THE PETITION

The decision of the Illinois Supreme Court in this case is contrary to prior precedents of the United States Supreme Court and the Supreme Courts of other states. The case at bar represents a denial of a state citizen's right to equally enjoy facilities held in trust by a subdivision of the State for all citizens of the state. The Illinois Supreme Court found that the right to use trust property was not a fundamental right and thus it was not necessary to determine whether there existed any substantial connection between the discrimination and any burdens imposed by the citizens' use of trust property. In this case there are no additional burdens imposed as a result of Illinois citizens who do not reside within the Chicago Park District using moorings in the Chicago harbor; it is so stipulated by the defendant. Thus the sole rationalization is that they are favoring their own residents at the expense of nonresidents in the use of trust property which happens to be located in their jurisdiction. This is blatantly unequal treatment of a class of citizens by the State, which cannot be condoned by this Court.

The reason utilized by the Illinois court is that the residents pay taxes and thus support the moorings. Nothing could be farther from the truth. Rather than the residents supporting the harbors with tax money, the harbors support the residents in excess of $2,500,000 per year, that being the profits made by the defendant each year on mooring fees. This is emphatically not a case where nonresident users are only being charged costs while residents are subsidized as in *Sturgis v. Washington*, 368 F.Supp. 38 (N.D. Wash. 1970) (Three-judge court),

summarily affirmed 414 U.S. 1057 (1973) (involving tuition charged by a State university to out-of-state students).

The Illinois court has violated plaintiffs' right to due process by creating a new method of raising revenue by creating a new animal: a fee which is "in the nature of a rental". It is neither tax nor fee nor is it subject to judicial review, according to the Illinois Supreme Court, nor taxpayer revolt, since the commissioners of the Chicago Park District are merely appointed by the Mayor of Chicago, and not directly answerable to the citizens of Illinois who must pay the taxes they levy in the form of mooring fees.

A. The Illinois Supreme Court's Decision Is Contrary To The United States Supreme Court's Holding That The Citizens Of Illinois Have A Fundamental Right To Equal Treatment In The Enjoyment Of Property Held By Illinois In Trust For All Its Citizens

The Public Trust Doctrine as enunciated by this Court in the seminal case of *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, 455-57 (1892), is as follows:

> " . . . the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State."
>
> "Many other cases might be cited where it has been decided that the bed or soil of navigable waters is held by the people of the State in their character as sovereign in trust for public uses for which they are adapted."

Illinois Central Railroad involved the very same harbor that is in controversy in the case at bar. The Public Trust Doctrine, established in *Illinois Central Railroad*, had, until the Illinois Supreme Court's decision in this case, been followed and expanded upon in an unbroken string of cases throughout the century that followed. As recently as 1970 and 1976, the Illinois Supreme Court had stated the doctrine, as follows:

> "When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties." *Paepcke v. The Public Building Commission of Chicago*, 46 Ill.2d 330, 263 N.E.2d 11, 16 (1970); *People Ex. Rel. Scott v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773, 780, 4 Ill.Dec. 660, 667 (1976) (emphasis in originals).

The Illinois Supreme Court in this case ignored the doctrine. No authority is given by the Illinois Supreme Court that supports its holding that it can deny parks to some of its citizens based on their residency.

The effect of the Illinois Supreme Court's ruling is to emasculate the Public Trust Doctrine, as established by this Court in *Illinois Central Railroad*, and to replace it with a system akin to feudalism, whereby the privilege to use a particular park or facility becomes an incident of one's birth. Not only did the Illinois Supreme Court ignore the progress and evolution of a century of case law developing the Public Trust Doctrine, but it also reverted to Medieval Age reasoning when it chose to apportion the rights of citizens of Illinois solely on the basis of

residency within the state. Park districts across the nation are encouraged to build Great Walls of discrimination around each district, to keep out the non-resident infidels, who are not worthy to share equally the privileges to which the residents were accidently born. The state of Illinois should not be allowed to obliterate the fundamental right that all citizens have under the Public Trust Doctrine to use and enjoy the parks of this nation, free from discrimination solely on the basis of their residency.

B. The Decision Is Contrary To The United States Supreme Court's Holding That A State Cannot Discriminate Between Its Citizens Based Soley On Past Payment Of Real Estate Taxes.

The Illinois Supreme Court's holding rests squarely on its premise that it is permissible to discriminate in the allocation of state assets among its citizens based solely on past real estate tax contributions. As the Illinois Supreme Court states:

> "Through these taxes and bonds the residents of the park district support services and facilities that are not supported by nonresidents. . . .The differential in mooring fees reflects a reasonable approach to equitably distribute the costs of providing these facilities, and is founded on a rational basis." (App. A, 11a-12a)

This Court has repeatedly held that the Equal Protection Clause prohibits apportionment of state services based on past tax contributions. As this Court held in *Shapiro v. Thompson*, 394 U.S. 618, 632-33 (1968):

> "Appellants' reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police

and fire protection. Indeed it would permit the State to apportion all benefits and services to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens." (footnotes omitted)

1. The Non-Resident Surcharge Fails To Pass The Legitimate Basis Test Under The Equal Protection Clause Even If No Fundamental Right Were Involved

The non-resident surcharge cannot withstand scrutiny under even the rational basis test employed by the Illinois Supreme Court, and the basis found by the court to support the discrimination is fallacious and illusory. The Illinois Supreme Court adopted the appellate court's reason for discrimination as follows:

> "[W]here a local public entity has recreational resources which are finite, it has a justifiable interest in favoring the utilization of those resources by its residents over nonresidents." (App. p. 8.)

No authority is given by the Illinois Supreme Court for its above conclusion. Certainly there is none which will support it.

This Court has many times stated the standard for Equal Protection under the federal Constitution. In *Turner v. Fouche*, 396 U.S. 346, 363 (1970), the Court stated it as follows:

> "[T]he traditional test for a denial of equal protection: whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective."

Application of this standard to the present case shows that the Park District's non-resident surcharge violates Equal Protection for two reasons: one, the Park District's objective of favoring residents over non-residents in the use of public property is not a "valid state objective"; and, two, even if it were a valid objective, the grounds used are wholly irrelevant to the achievement of the objective.

The Illinois Supreme Court's stated reason is fallacious, because it permits discrimination in *every* instance – since all recreational resources can be considered finite. Second, there is nothing in the record to show it to be true. It is just not true. Harbors are not wasting assets. In Chicago, the harbors occupy only a minute fraction of the shore space available to the Park District. There are unused miles and miles of potential harbors. As the Illinois Supreme Court itself recognized in *Chicago Park District v. City of Chicago*, 111 Ill.2d 7, 488 N.E.2d 968, 972 (1986), "this [a decrease in the waiting list] was accompanied, however, by a steady increase in the number of moorings available from 3,674 in 1978 to 5,090 in 1983." This growth is continuing. Plaintiffs asked the Illinois Supreme Court to take judicial notice of the CPD's Director of Harbors announcement, circulated to the class

members, that the Chicago Park District is adding a new Turning Basin Marina and has plans for additional harbors. (App. E, 39a) Rather than being scarce and limited facilities, the moorings are an expanding asset.

Paraphrasing the Court's holding in *Turner v. Fouche, supra,* the proper application of the Equal Protection standard leads to the conclusion that, just as in *Turner,* the appellants and members of their class (non-residents of the Chicago Park District) do have a federal constitutional right to have access to publicly-owned recreational facilities without the burden of invidiously discriminatory disqualifications. The Park District may not deny to some the privilege that it extends to others on the basis of distinctions that violate federal constitutional guarantees. *Compare Turner v. Fouche,* 396 U.S. at 363.

2. There Is No Case Support For The Decision.

Significant by its absence is any citation by the Illinois Supreme Court to one decision from any state sanctioning discrimination between residents of the same state based on residency. No other state allows discrimination in the use of its park facilities based on municipal residency and therefore Illinois residents are being denied the protections of all other state residents in violation of the Constitution. Instead, the Illinois Supreme Court bases its entire opinion for overturning the trial court's order regarding the nonresident surcharge on *Baldwin v. Fish and Game Commission of Montana,* 436 U.S. 371 (1979). Its faith in the power of this case is misplaced. The trial court's succinct and accurate summation of its irrelevancy was as follows:

> "THE COURT: I don't have any trouble with *Baldwin*. *Baldwin* dealt with non-residents of a state as opposed to residents of a state. The class of people that we are dealing with are all residents and taxpayers of the same state." (R.373, p. 19)

The *Baldwin* case upheld a Montana hunting license system, which charged nonresidents of the state substantially greater than residents for a license to hunt elk and other game. There, this Court discussed at length the relationship between citizens of different states. In discussing the Privileges and Immunities Clause, this Court in countless areas pointed out in numerous places that its concern was with the relationship of residents of one state to another state. *See* 436 U.S. at 380-82.

It is obvious from *Baldwin* that this Court was dealing with the relationship of citizens of one state with another state. This is *not* the issue in this case. The issue here is whether the *Chicago Park District* can charge an Illinois citizen who is a resident of, e.g., Wilmette or Evanston, an extra fee for use of its harbor when no other state allows such discrimination soley based on residence. *Baldwin* is totally irrelevant to a determination of this issue. Even the Court in *Baldwin* recognized that the case did not apply to discrimination among residents of the same state when it stated as follows:

> "It appears to have been generally accepted that although the States were obligated to treat all those within their territory equally in most respects, they were not obligated to share those things they held in trust for their own people." 436 U.S. at 384.

It is this obligation to treat all citizens equally that is being denied Illinois citizens by the state. Not only does *Baldwin* not deal with the facts in this case, but this Court decided a case six years later, that *does* deal with the facts applicable here, holds directly against the holding of the Illinois Supreme Court. See *United Building and Construction Trades Council of Camden County and Vicinity v. City of Camden*, 465 U.S. 208, 79 L.Ed. 249, 104 S.Ct. 1020 (1984), which held that discrimination based upon municipal residency is subject to the "substantial reason" test of the Privileges and Immunities Clause.

The Illinois Supreme Court incorrectly applied *Baldwin*. This Court's analysis in *Baldwin* was the standard "additional burdens imposed" used in privileges and immunities cases. In *Baldwin*, this Court held that the nonresidents' use of Montana hunting facilities did create additional burdens on the State of Montana (436 U.S. at 390) which justified a higher fee to be imposed on nonresidents. In the case at bar, there are no additional burdens imposed on the Chicago Park District in providing moorings to nonresidents; the cost is the same.

Baldwin does *not* deal with property "held in trust for the equal benefit of all the people of the state" that must *not* be operated "in such a manner that a preferential use thereof is granted to any one person or to any one group of persons." *Lincoln Park Traps v. Chicago Park District*, 323 Ill.App. 107, 114, 55 N.E.2d 123 (1944). Finally, the *Baldwin* Court was not confronted with a state constitution which prohibits non-uniform fees. Illinois Constitution, Art. IX, Sec. 2.

The Illinois Supreme Court's holding is without basis in the law and the facts of the case. It sets a dangerous precedent. Does this Court seriously believe that the Illinois Supreme Court would not have followed the U.S. Constitution and Illinois Constitutional guidelines and case law if the case had been brought against the white Cicero Park District for discrimination against black Chicago residents? Does the Court seriously doubt that park districts throughout the Chicago metropolitan area known for its high degree of segregation always seeking ways to invidiously discriminate against their neighbors welcome the Illinois Supreme Court's opinion with open arms, and cannot hesitate to draw this sword from their sheath? The potential for abuse is enormous on a national basis.

C. The United States Supreme Court Should Grant Certiorari To Resolve A Conflict In Decisions Among The States Regarding The Rights Of State Citizens To Enjoy Public Trust Property

The states are far from uniform when dealing with the Public Trust Doctrine. The enlightened jurisdictions forbid inequality in the use of Public Trust property, e.g., *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47 (1972); *Gewirtz v. City of Long Beach*, 330 N.Y.S.2d 495 (1972), while under the guise of tax support certain states deny all access to park facilities for nonresidents, e.g., *McClain v. South Pasadena*, 318 P.2d 199 (Cal. App. 1957), while others deny access to special facilities constructed with tax revenue, e.g., *Zaroogian v. Town of Narragansett*, 501 F.2d 302 (D. Ct. R.I., 1988).

In *McClain v. South Pasadena*, 318 P.2d 199 (Cal. App. 1957), the City of South Pasadena, California, owned and operated a water slide located within the city. 318 P.2d at 202-03. The city limited the use of the slide to residents only, because when non-residents were allowed to use it, residents had difficulty in using the slide. 318 P.2d at 203. At that time, no blacks lived within the city of South Pasadena. 318 P.2d at 202. The plaintiff, a nine-year-old black girl, was denied admittance to the slide when she attempted to gain entrance with two white friends and their father. All were non-residents of South Pasadena. 318 P.2d at 203. The only reason that the ticket-collector knew that the plaintiff was not a resident was the color of her skin. *Id.*

The California appellate court rejected the plaintiff's federal equal protection challenge to the ordinance limiting the slide's use to residents. 318 P.2d at 207. The court held:

> "A regulation making a different provision for people residing outside a municipality from those residing in it is valid if the classification is based on a reasonable distinction. Such a regulation is not unconstitutional because it results in some practical inequality. . . . a classification is reasonable if it has a substantial relation to a legitimate objective to be accomplished. . . . The purpose of the regulation is to avoid congestion in the plunge. . . . Plaintiff was not excluded from the plunge because she is a Negro. She was excluded, like the Caucasians who were with her, because she was a non-resident." 318 P.2d 207-210.

The California court's distinction between residency-discrimination and race-discrimination is a fallacious one

in those parts of the country, such as Chicago, where communities are racially segregated. The Illinois Supreme Court's decision in this case, and the decision in *McClain*, will allow such communities to exclude their neighbors of different races and economic status from city-owned facilities, under the guise of residency-discrimination.

A more enlightened approach was taken by the court in the leading case of *Borough of Neptune City v. Borough of Avon-By-The Sea*, 61 N.J. 296, 294 A.2d 47 (1972), where the Supreme Court of New Jersey invalidated a restriction on the use of a beach by residents only. The issue of what rights citizens of a single state have under the equal protection clause to use Public Trust property has not been decided by this Court, but the question is ripe for the Court's consideration.

D. The Citizens Of Illinois Have A Fundamental Right To Be Taxed At Equal Rates, Unless A Compelling Reason Exists To Impose A Higher Tax Against A Class Of Citizens

Article IX, Section 2 of the Illinois Constitution of 1970 (the "Uniformity Clause" or "Uniform Fees Clause") provides as follows:

> "In any law classifying the subjects or objects of non-property taxes *or fees*, the classes shall be reasonable and the subjects and objects within each class shall be taxed *uniformly*." (Emphasis added.)

The Uniformity Clause of Article IX, Section 2 grants the citizens of Illinois a fundamental right to be taxed on an equal basis. The presence of this right requires the non-resident surcharge to be strictly scrutinized. The

appellate court should have applied the stricter review standard to the Park District's practice of discriminating against non-residents, but failed to do so. The Park District charged a fee 25% greater to nonresidents than to residents, while admitting that there are no additional costs for supplying moorings to nonresidents than to residents.

The Illinois Supreme Court, in *Searle Pharmaceuticals, Inc. v. Department of Revenue*, 117 Ill.2d 454, 512 N.E.2d 1240 (1987), explained in detail the limitations on non-property taxes and *fees* by the application of the Uniformity requirement. In *Searle*, this Court held, after reviewing the history behind Article IX, Section 2 (117 Ill.2d at 468-69, 512 N.E.2d at 1245-46), that under the section "a broader [i.e., stricter] limitation on the legislative power to classify for non-property purposes was intended to be included in the language of Section 2 than the limitation of the equal protection clause." 117 Ill.2d at 469, 512 N.E.2d at 1246. Plaintiffs have been denied due process because they cannot, under the Illinois Supreme Court decision, challenge either the amount or legality of the taxes imposed by the Chicago Park District's licensing for revenue.

E. The Illinois Supreme Court's Creation Of A New Power To Raise Revenue After The Adoption Of The Illinois Constitution In 1970 Denies Plaintiffs' Right To Due Process.

The Illinois Supreme Court has now created a new power to raise revenue "in the nature of a rental" where such power is contrary to the specific prohibitions of the Illinois Constitution. Article VII, Sections 1 & 8 of the

Illinois Constitution set up local units of government which have only those powers which are granted by law. In addition Article VII, Section 6(e) prohibits licensing for revenue and Article IX, Section 2 which requires that all taxes and fees shall be taxed uniformly. Not only is an implied "in the nature of a rental" power not granted to the Chicago Park District, but the statute which transferred the harbors to them provides that the real and personal property connected with the operation of the harbors are exempt from taxation. (Ill.Rev.Stats. Ch. 105, Section 333.23p). Yet, fees that are in the nature of a rental are taxation since they are not related to the costs of supplying the facilities and are thus a prohibited license for revenue.

The Uniformity Clause of Article IX, Section 2 grants the citizens of Illinois a fundamental right to be taxed on an equal basis. The presence of this right requires the non-resident surcharge to be strictly scrutinized. The appellate court should have applied the stricter review standard to the Park District's practice of discriminating against non-residents, but failed to do so. The Park District charged a fee 25% greater to nonresidents than to residents, while admitting that there are no additional costs for supplying moorings to nonresidents than to residents.

Nowhere in either decision of the Illinois Courts do they mention the statutory or constitutional prohibitions under which the Park District operates. Not burdened by constitutional constraints, the residents of the Chicago Park District are now more equal than any other citizens of Illinois. The Orwellian society has arrived in Illinois.

CONCLUSION

As was pointed out by Professor Sax in his authoratative law review article:

> "When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties."
>
> "We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit. *Borough of Neptune City v. Borough of Avon-By-The-Sea* (1972); 61 N.J. 296, 309, 294 A.2d 47, 54-55, and cases and authorities cited therein; see also *Marks v. Whitney* (1971), 6 Cal.3d 251, 98 Cal.Rptr. 790, 491 P.2d 374." Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich.L.Rev. 471, 490 (1970).

It is time for this Court to set forth the ground rules for the restrictions municipalities and other units of government may be permitted under the Equal Protection

Clause. The Court should grant the petition for writ of certiorari.

Respectfully submitted,

Thomas E. Broeckl,
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individually, and on
behalf of those similiarly situated

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APPENDIX A

544 N.E.2d 792

Thomas J. BROECKL et al., Appellants,

v.

The CHICAGO PARK DISTRICT, Appellee.

No. 67466.
Supreme Court of Illinois.

Sept. 20, 1989.

Nonresidents challenged fees charged by city park district for mooring activities. The Circuit Court, Cook County, Arthur L. Dunne, J., found that the park district could make a profit by charging mooring fees, but that statute authorizing practice of charging nonresidents higher fees was unconstitutional. Both parties appealed. The Appellate Court, 170 Ill.App.3d 1063, 120 Ill.Dec. 863, 524 N.E.2d 1045, found that park district could make a profit, and that statute authorizing higher fees for nonresidents was constitutional. On appeal, the Supreme Court, Ryan, J., held that: (1) city was entitled to operate its harbors at profit; (2) privileges and immunities clause did not apply where city discriminated against intrastate residents; (3) statute authorizing city to charge higher mooring fees to nonresidents did not violate equal protection clause; and (4) park district did not hold the harbors in trust for the benefit of the public.

Affirmed.

Craig E. Anderson, Charles J. Corrigan, Allen D. Choka, and Herbert I. Rothbart, Chicago, for appellants.

George F. Galland, Jr., Davis, Barnhill & Galland, Chicago, for appellee.

Peter M. Murphy, Springfield, for amicus curiae Illinois Association of Park Districts.

Thomas W. Kelty, Pfeifer & Kelty, P.C., Springfield, for amicus curiae Illinois Municipal League.

Justice RYAN delivered the opinion of the court:

This appeal involves the validity of mooring fees imposed by the Chicago Park District. Two issues are presented. The first is whether the park district's practice of charging mooring fees in excess of the expenses and costs actually incurred is permissible. The second issue is whether the statute that permits the park district to charge nonresidents of Chicago a higher fee than residents is unconstitutional and void.

The defendant, the Chicago Park District, charges mooring fees that exceed operation and maintenance costs of recreational boating harbors. The defendant also charges nonresidents of Chicago a 25% higher fee than it charges residents. As a result of these practices, it is alleged that the defendant makes a 100% to 500% profit. The plaintiffs filed a class action in the circuit court of Cook County, contending that this profit-generating activity is illegal. The plaintiffs additionally contended that both the statute authorizing the park district to charge nonresidents higher mooring fees (Ill.Rev.Stat.1987, ch. 105, par. 333.23n(g)) and the park district's practice of charging nonresidents higher fees are unconstitutional. The trial court held that the park district could make a profit by charging mooring fees that

exceed operating and maintenance costs. The trial court also held the park district's practice of charging nonresidents higher fees, and the statute authorizing this practice, unconstitutional and void.

Both parties appealed. The appellate court affirmed the trial court's holding that the park district could generate a profit by charging fees that exceed costs. The appellate court, however, found that the practice of imposing higher fees upon nonresidents was constitutional, and thus reversed the trial court's decision on this issue. 170 Ill.App.3d 1063, 120 Ill.Dec. 863, 524 N.E.2d 1045.

We acknowledge that the concept of "profit" in the context of the park district's operation is vague and elusive. Nevertheless, we must examine the issue raised by plaintiffs of whether the park district may generate a "profit" by charging fees that exceed costs. The appellate court rejected the plaintiffs' argument that the park district is required by law to limit fees to an amount approximating the cost of furnishing and maintaining the moorings. The court reached this conclusion after examining several portions of the statutory scheme (Ill.Rev.Stat.1987, ch. 105, par. 333.1 *et seq.*) that authorize and regulate park district functions, and finding specific language indicating that the park district could make a "profit" through the rental of harbor spaces. (170 Ill.App.3d at 1065-66, 120 Ill.Dec. 863, 524 N.E.2d 1045.) The appellate court also relied upon this court's opinion in *MacNeil v. Chicago Park District* (1948), 401 Ill. 556, 82 N.E.2d 452. We have reviewed the applicable statutory authority and the *MacNeil* decision, and agree with the appellate court's decision that the park district may derive a profit from the mooring fees.

We begin by examining the statutory authority that creates and confers powers upon the park district (See Ill.Rev.Stat. 1987, ch. 105, par. 333.1 *et seq.*) After reviewing the applicable grant of statutory authority, we agree with the appellate court's conclusion that the legislature intended that the park district operate the harbors at a profit; that is, it did not intend to limit the park district to charging fees that only cover the cost of operation. (See Ill.Rev.Stat.1987. ch. 105, par. 333.1 *et seq.)* We first find evidence of this intent in sections 26.1 through 26.10 of the statute, which authorize the park district to charge rental fees for mooring boats in the city's harbors. (Ill.Rev.Stat.1987, ch.105, pars. 333.23*l* through 333.23u.) The specific authorization to charge fees is found in section 26.3(g) of the park district statute (Ill.Rev.Stat.1987, ch. 105, par. 333.23n(g)), which provides that the park district may "establish and collect fees for all facilities and services, and compensation for all materials furnished. Fees charged nonresidents of such district need not be the same as fees charged to residents of the district." We note that this language does not create a limitation on the amount of fees, and it thus indicates a legislative intention that the determination of the amount to be charged is within the discretion of the park district.

We note that the statute authorizes the park district to charge nonresidents more than residents. Because the operating cost of providing moorings to nonresidents is the same as the cost of providing moorings to residents, we agree with the appellate court that "this statutory provision reflects a legislative intention not to tie the fees charged for moorings to defendant's costs and expenses for furnishing and maintaining the moorings." (170

Ill.App.3d at 1066, 120 Ill.Dec. 863, 524 N.E.2d 1045.) If the legislature had intended that the fees charged for moorings were to be limited to actual costs, the legislature would not have explicitly stated that nonresidents could be charged higher fees.

Further support for the park district's argument that the legislature intended that it generate profits from the harbors is found in section 26.7, which authorizes the park district to issue revenue bonds to acquire, construct, enlarge, improve, operate, and maintain its harbors. (Ill.Rev.Stat. 1987, ch. 105, par. 333.23r.) Subsection (*l*) of this section provides that the park district ordinance that governs such bond issues may include "convenants as may be deemed necessary or desirable to assure a *successful and profitable operation* of the harbor and facilities, and prompt payment of the principal of and interest upon the bonds." (Emphasis added) (Ill.Rev.Stat. 1987, ch. 105, par. 333.23r(*l*).) This language reveals a legislative intention that the park district be authorized to conduct a profitable operation of its harbors. In short, we reject the plaintiffs' argument that the mooring fees must mirror actual costs. We agree with the appellate court's deductive reasoning that "[s]ince mooring fees are the Chicago Park District's main source of revenue from the harbors, if a profitable operation of the harbors is to be accomplished, it can only be accomplished through profits derived from mooring fees." 170 Ill.App.3d at 1066, 120 Ill.Dec. 863, 524 N.E.2d 1045.)

Section 26.8 of the statute further supports this conclusion. (Ill.Rev.Stat.1987, ch. 105, par. 333.23s.) This section provides that the park district may receive revenues

from the operation of its harbors in excess of the requirements for retirement of revenue bonds or for payment of maintenance, operation, depreciation, rehabilitation and expansion of the harbors. After all such bonds have been paid, the revenues may be transferred to the general corporate fund of the park district and used for the maintenance, operation, repair and development of the harbors or "for any corporate purpose." (Ill.Rev.Stat.1987, ch. 105, par. 333.23s.) The legislature would not have included this provision if it had not intended that the park district make a profit through operation of the harbors. The fact that the statutory language explicitly provides that any amount of money earned could be used for either harbor purposes or any corporate purpose indicates that the legislature did not intend that the park district restrict fees to actual costs.

The plaintiffs argue, however, that the statutory scheme detailed above does not apply in the instant case because it only applies to bonded facilities. The statute provides that revenues from the facilities (bonded moorings) may be used for any corporate purpose once the bonds have been paid off. We believe that this authorization demonstrates that mooring fees from nonbonded moorings may also be used for general corporate purposes because once the bonds are paid, bonded facilities become nonbonded facilities. Because there is no apparent reason why the legislature would allow only bonded mooring revenues to be used for general corporate purposes once the bonds are paid, we find that the plaintiffs' argument on this issue is without merit.

The plaintiffs make several additional arguments that hinge upon their premise that the legislature intended to

create special rules for bonded moorings with respect to their profit-generating capacity. Because we have concluded that the legislature intended that the park district operate all of its mooring facilities in a profitable fashion, we find it unnecessary to address these arguments.

In reaching its decision, the appellate court relied upon this court's decision in *MacNeil v. Chicago Park District* (1948), 401 Ill.556, 82 N.E.2d 452, which predated the enactment of that section of the park district statute which authorizes charging fees. In *MacNeil*, the plaintiff was a boat owner who contended that the park district did not possess the requisite authority to charge mooring fees. The plaintiff further alleged that the fees were unreasonable and arbitrarily excessive, bearing no reasonable relation to the cost of regulation or to any special service rendered to boat owners. (*MacNeil*, 401 Ill. at 559, 82 N.E.2d 452.) This court rejected the plaintiff's arguments and found that the park district possessed the authority to charge mooring fees and that the amount of the fees was reasonable. Although at the time the *MacNeil* case was decided no specific statutory authorization for such fees existed, this court stated:

> "We know of no case which holds that a particular act complained of, such as the assessment of harbor fees in this case, must be supported specifically in exact words in a statute. We, therefore, hold that, in the circumstances of the case at bar, the power to establish and maintain rules and regulations for the use of lagoons and harbors by the public carries with it the power to require a reasonable fee for the use of such special facilities." *MacNeil*, 401 Ill. at 564, 82 N.E.2d 452.

The plaintiffs in the present case, like the plaintiffs in *MacNeil*, argue that the mooring fees are, in effect, licensing fees that must be limited to a level approximating the cost of regulating the questioned activity. This court rejected that argument in *MacNeil* and we reject it again in the case before us. As this court held in *MacNeil*, such an argument is valid only if the fees were imposed under the park district's police power. (See *MacNeil*, 401 Ill. at 564, 82 N.E.2d 452.) Charging mooring fees, however, is not a police power measure. The reasoning employed in *City of Springfield v. Inter-State Independent Telephone & Telegraph Co.* (1917), 279 Ill. 324, 116 N.E. 631, which was cited in the *MacNeil* case, applies in the present case as well:

> "The ordinance was not a police ordinance. It was not passed for the enforcement of local governmental supervision, but only to establish a charge in the nature of rental for the exclusive use of parts of the streets. The fixing of a charge in the nature of rental for the occupation by a public service corporation of parts of the streets of a city is not the exercise of any governmental power but is the exercise of the proprietary power of the city." *Springfield*, 279 Ill. at 327, 116 N.E. 631.

Thus, we conclude that the park district was not exercising a police power function when it imposed the mooring fee. Rather, the fee is in the nature of a rental and is permissible under the *MacNeil* holding. Because we find that the mooring fee is a rental charge, we will not address the plaintiffs' argument that the fee constitutes the unconstitutional practice of "licensing for revenue."

We now turn out attention to the second issue in this case: whether the statute that permits the park district to charge nonresidents of Chicago a higher fee than residents is unconstitutional and void. We find that the statute (Ill.Rev.Stat.1987, ch. 105, par. 333.23n(g)) satisfies constitutional safeguards and, therefore, affirm the holding of the appellate court.

The appellate court's opinion in this case (170 Ill.App.3d at 1068, 120 Ill.Dec. 863, 524 N.E.2d 1045) and the briefs filed in this court discuss the privileges and immunities clause of the Federal Constitution (U.S. Const., art. IV, § 2) and also *Baldwin v. Fish & Game Comm'n* (1977), 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354. We find, however, that any discussion of the privileges and immunities clause of the Federal Constitution is inappropriate. That clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." (U.S. Const., art. IV, § 2.) The Supreme Court, in *Baldwin*, has summarized the application of the clause as follows:

> "When the Privileges and Immunities Clause has been applied to specific cases, it has been interpreted to prevent a State from imposing unreasonable burdens on *citizens of other States* in their pursuit of common callings within the State [citation]; in the ownership and disposition of privately held property within the State [citation]; and in access to the courts of the State [citation]." (Emphasis added.) *Baldwin*, 436 U.S. at 383, 98 S.Ct. at 1860, 56 L.Ed.2d at 364-65.

In short, the clause prohibits one State from discriminating against citizens of another State. The privileges and immunities clause does not apply where a city or

municipal ordinance discriminates against intrastate residents. (*United Building & Construction Trades Council v. Mayor & Council* (1984), 465 U.S. 208, 217, 104 S.Ct. 1020, 1027, 79 L.Ed.2d 249, 257.) We find that the privileges and immunities clause does not apply in the present case because the plaintiffs are in-state plaintiffs complaining about a statute that favors residents of Chicago. Thus, the plaintiffs do not possess the requisite standing to challenge the statute on this ground.

We also reject the plaintiffs' argument that the 25% surcharge on nonresidents of the park district violates equal protection guarantees, and conclude that the surcharge survives scrutiny under both the Federal equal protection clause (U.S. Const., amend XIV) and the Illinois equal protection clause (Ill.Const.1970. art. I, § 2). In the absence of a fundamental right or suspect classification, similar classes of people may be treated differently, if a rational basis exists. See *Jenkins v. Wu* (1984), 102 Ill.2d 468, 477, 82 Ill.Dec. 382, 468 N.E.2d 1162.

In *Baldwin*, the Court considered hunting license fees for the State of Montana. The fee for a nonresident's license to hunt elk was substantially more than that of a resident of Montana. The Supreme Court held that this treatment of nonresidents did not violate the privileges and immunities clause of the Federal Constitution, because equality in access to Montana elk is not basic to the maintenance or well-being of the Union. *Baldwin*, 436 U.S. at 388, 98 S.Ct. at 1863, 56 L.Ed.2d at 368.

The Supreme Court then considered the equal protection aspect of the distinction drawn between residents and nonresidents. (*Baldwin*, 436 U.S. at 388-92, 98 S.Ct. at

1863-64, 56 L.Ed.2d at 368-70.) The Court noted that a resident of the State of Montana assists in the maintenance of big-game population through taxes. The same taxes support the State parks utilized by sportsmen, provide roads for access to the hunting areas, provide fire suppression to protect wildlife habitats, provide a means for enforcing game laws, and provide other services incident to maintaining necessary aids to a satisfactory hunting environment. The Court noted that on the other side of the same ledger is the almost alarming increase in the number of nonresident hunters and the additional problems presented by their presence. The Court found that the legislature's choice of a differential in hunting license fees was an economic means not unreasonably related to the preservation of a finite resource, wild elk.

The same rationale compels us to hold that the difference in mooring fees charged to residents of the park district and to nonresidents is not a violation of the equal protection clause of the Federal or this State's Constitution. The park district is authorized to levy taxes (Ill.Rev.Stat.1987, ch. 105. par. 333.19) and to issue bonds (Ill.Rev.Stat.1987, ch. 105, par. 333.20). Through these taxes and bonds the residents of the park district support services and facilities that are not supported by nonresidents. In fact, if the mooring fees charged to both residents and nonresidents were the same, the residents of the park district would be paying a disproportionate share of the costs of maintaining the park district's services and facilities.

As noted by the Supreme Court in *Baldwin*, the other side of the ledger reflects an ever-increasing demand for a limited resource, in our case, harbor facilities. The

differential in mooring fees reflects a reasonable approach to equitably distribute the costs of providing these facilities, and is founded on a rational basis.

The plaintiffs also challenge the fee differential on the basis of the public trust doctrine, contending that the park district is attempting, through the use of the surcharge on nonresidents, to reallocate the mooring facilities from the general public to the residents of the park district. In *MacNeil*, the plaintiffs also contended that the park district held the harbors in trust for the benefit of the public and that the fees charged must be based on the reasonable costs of the special services provided. This court rejected that contention in *MacNeil*, and held that the park district was, in effect, renting the mooring facilities and could charge reasonable fees for the use of those facilities, and that the amount of the fees charged was discretionary in the park commissioners. (*MacNeil*, 401 Ill. at 565-66, 82 N.E.2d 452.) True, *MacNeil* did not involve a surcharge for nonresidents. However, if the amount of the fee is discretionary in the park commissioners, as the court held in *MacNeil*, then, absent an equal protection violation, the fees charged to nonresidents may be more than those charged to residents. The park district correctly notes, in its briefs, that the public trust doctrine is not a super equal protection clause to be used to strike down reasonable legislative classifications.

In summary, we affirm the appellate court's decision that the park district's practice of charging mooring fees in excess of the expenses and costs actually incurred is permissible. We also affirm the conclusion of the appellate court that the statute that permits the park district to

impose a 25% surcharge upon nonresidents is constitutional. The judgment of the appellate court is affirmed.

Affirmed.

Justice MILLER took no part in the consideration or decision of this case.

APPENDIX B

170 Ill.App.3d 1063
524 N.E.2d 1045

Thomas E. BROECKL, James A. Brown, and Robert D. Phelps, III, Individually and on behalf of those similarly situated, Plaintiffs-Appellants/Cross-Appellees,

v.

The CHICAGO PARK DISTRICT,
a municipal corporation,
Defendant-Appellee/Cross-Appellant.

Nos. 85-2995, 85-3062.

Appellate Court of Illinois,
First District, Third Division.

May 18, 1988.
Rehearing Denied June 30, 1988.

Nonresidents challenged fees charged by city park district for mooring activities. The Circuit Court, Cook County, Arthur L. Dunne, J., entered summary judgment which permitted city to collect fees in excess of expenses but which provided that statute under which higher fee was charged to nonresidents was unconstitutional and void, and appeal was taken. The Appellate Court, Rizzi, J., held that: (1) city was entitled to operate its harbors at profit, and (2) statute which authorized city to charge higher mooring fees to nonresidents was not unconstitutional.

Affirmed in part, reversed in part and remanded.

Craig E. Anderson, Lowell H. Jacobson, Allen D. Choka, Herbert I. Rothbart, Chicago, for plaintiffs-appellants/cross-appellees.

George F. Galland, Jr., Chicago, for defendant-appellee/cross-appellant.

Justice RIZZI delivered the opinion of the court:

These consolidated appeals are from a declaratory judgment class action suit in which plaintiffs allege that defendant, Chicago Park District, illegally levied and collected mooring fees in excess of the expenses and costs incurred in connection with related mooring activities. Plaintiffs also allege that the statute which permits defendant to charge higher fees to nonresidents of Chicago is unconstitutional, and that it is an unconstitutional practice for defendant to charge higher mooring fees for nonresidents of Chicago. Both plaintiffs and defendant filed motions for summary judgment, which were granted in part and denied in part. We conclude that the trial court properly entered a summary judgment allowing defendant to levy and collect mooring fees in excess of the expenses and costs incurred in connection with related mooring activities. We also conclude that the trial court erred in entering a summary judgment which provided that the statute which permits defendant to charge a higher fee to nonresidents of Chicago is unconstitutional and void. In addition, we conclude that the trial court erred in entering a summary judgment which provides that it is an unconstitutional practice for defendant to add a 25% surcharge on mooring fees to nonresidents of Chicago. We therefore reverse and remand.

The facts that are essential to resolve the issues in this case are neither complex nor disputed. Defendant concedes that the mooring fees it charges exceed its costs and expenses for operating and maintaining its recreational boating harbors. Defendant makes a 100% to 500% profit on the fees. Also, nonresidents of Chicago are charged a 25% higher fee than residents of Chicago for the same facilities and services.

Plaintiffs first argue that in setting fees for the rental of its harbor moorings, defendant is required by law to limit the fees to an amount approximating the cost of furnishing and maintaining the moorings. The trial court rejected plaintiff's argument, and we agree with the trial court.

We believe that the pertinent statutory scheme that is involved here must be examined to determine the extent to which defendant may impose mooring fees. The creation, maintenance, operation and improvement of the Chicago Park District is pursuant to a legislative enactment entitled, Chicago Park District. Ill.Rev.Stat. 1987, ch. 105, par. 333.1 *et seq.* The rental of harbor moorings is authorized and regulated by paragraphs 333.23*l* through 333.23u of the statute. Paragraph 333.23r requires the Chicago Park District to pass an ordinance in order to issue revenue bonds to acquire, construct, enlarge, improve, operate and maintain its harbors. Subsection (*l*) of paragraph 333.23r provides that the ordinance may include "covenants as may be deemed necessary or desirable to assure a successful and profitable operation of the harbor and facilities, and prompt payment of the principal of and interest upon the bonds * * *." It follows that the legislature intended that the Chicago Park District

should conduct a profitable operation of its harbors. Since mooring fees are the Chicago Park District's main source of revenue from the harbors, if a profitable operation of the harbors is to be accomplished, it can only be accomplished through profits derived from mooring fees.

Moreover, paragraph 333.23s of the statute provides that the Chicago Park District may receive revenues from the operation of its harbors in excess of the requirements for retirement of revenue bonds or for payment of maintenance, operation, depreciation, rehabilitation and expansion of its harbors. Paragraph 333.23s also provides that after all such bonds have been paid, such revenues may be transferred to the general corporate fund of the Chicago Park District and used for the maintenance, operation, repair and development of the harbors or "for any corporate purpose." Plainly, this statutory provision demonstrates that the legislature contemplated that defendant would operate its harbors at a profit to be used for any corporate purpose, rather than being restricted to merely an operation to satisfy the cost and maintenance of the harbors.

In addition, in paragraph 333.23n(g) of the statute, the legislature permits defendant to charge higher fees for all of its facilities and services to nonresidents of Chicago. Since the cost of providing moorings to nonresidents is the same as the cost for providing moorings for residents of Chicago, this statutory provision reflects a legislative intention not to tie the fees charged for moorings to defendant's costs and expenses for furnishing and maintaining the moorings.

We therefore believe that the statutory scheme that is involved in this case clearly demonstrates that the legislature intended that defendant operate its recreational harbors at a profit, rather than being limited to operating its recreational harbors solely to satisfy the cost of furnishing and maintaining the harbors. The cases plaintiffs rely on have held that licenses granted under a municipality's police power must be limited to such a charge for a license as will bear some reasonable relation to the additional burdens imposed upon the municipality by the business or occupation licensed and the necessary expense involved in police supervision. These cases are inapposite because they involve licensing under a municipality's police power. A mooring rental is not in the nature of an exercise of a police power. The amount to be charged for mooring rentals is in the nature of a rental of public space and is therefore left to the discretion of the Chicago Park District Commissioners. It is not the province of this court to control the exercise of that discretion or to determine what amount of profit is permissible or excessive for mooring fees.

Although there was no specific statutory authorization for the Chicago Park District to charge mooring fees at the time the case was decided, *MacNeil v. Chicago Park District* (1948), 401 Ill. 556, 82 N.E.2d 452, is apposite. In *MacNeil*, a boat owner contended that mooring fees charged by the Chicago Park District were "unreasonable, arbitrarily excessive and bear no reasonable relation to the cost of regulation and to any special service rendered to boat owners." 401 Ill. 556, 559, 82 N.E.2d 452. The court said that the boat owner's argument would be applicable

to an ordinance passed under the police power, but mooring fees are not in the nature of an exercise of a police power. Rather, the court held that mooring fees are in the nature of a rental of public space and that the determination of the amount of a rental charge was within the discretion of the Chicago Park District Commissioners. The *MacNeil* court stated:

> In the case of *City of Springfield v. Interstate Independent Telephone and Telegraph Co.*, 279 Ill. 324 [116 N.E. 631], wherein this court held that a charge for the use of facilities for public space was in the nature of a rental, we further held that such an ordinance was not a police ordinance, but only established a charge in the nature of rental. The question of determination of the amount of a rental charge would seem to be discretionary, in the instant case, in the park commissioners. We have held that where the performance of official duty involves the exercise of the judgment or discretion of a municipal officer and where such officer has considered and determined what his course of action will be, and he has exercised his discretion, his action is not subject to review or control. (*Coughlin v. Chicago Park District*, 364 Ill. 90, 4 N.E.2d 1.) The case cited further held that when a statute vested discretion in a municipal body to determine any manner or thing, it is not the province of the court to control the exercise of that discretion. 401 Ill. 556, 565, 82 N.E.2d 452.

We believe that the present case, like *MacNeil*, is distinguishable from the cases relied upon by plaintiffs. This case does not involve the exercise of a police power. Plaintiff's argument is therefore without merit.

We next address the question of whether it is an unconstitutional practice for defendant to charge higher

mooring fees to nonresidents of Chicago. Illinois Revised Statutes, chapter 105, paragraph 333.23n(g), provides that the Chicago Park District may "establish and collect fees for all facilities and services, and compensation for materials furnished. Fees charged nonresidents of such district need not be the same as fees charged to residents of the district." Ill.Rev.Stat.1987, ch. 105, par. 333.23n(g). Pursuant to this authorization, defendant's mooring fees to nonresidents include a 25% surcharge over the fees charged to residents of Chicago. The trial court ruled that the pertinent statutory provision and the resulting surcharge are unconstitutional and void.

We shall first relate the statutory provision to the Privileges and Immunities Clause of the U.S. Constitution. The Privileges and Immunities Clause reads as follows: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const., art. IV, § 2. In *Baldwin v. Montana Fish and Game Comm'n* (1977), 436 U.S. 371, 383, 98 S.Ct. 1852, 1860, 56 L.Ed.2d 354, 365, the Court stated:

> Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally. Here we must decide into which category falls a distinction with respect to access to recreational big-game hunting.

The Court went on to hold that recreational hunting was not one of those interests protected by the Privileges and Immunites Clause, and the Court upheld a Montana statutory elk-hunting provision charging out-of-state hunters 7½ 20times more than Montana hunters for hunting licenses.

We believe that the holding in *Baldwin* is indissoluble from the question of whether the Privileges and Immunities Clause is applicable to mooring fees for recreational boating. Since the Privileges and Immunities Clause is not applicable to licensing fees for recreational hunting, we conclude that it is plainly not applicable to mooring fees for recreational boating.

We shall next consider whether the nonresident 25% surcharge violates the Equal Protection Clause of the Fourteenth Amendment. U.S. Const., amend. XIV. Here, we note that a differential in cost between residents and nonresidents is not in itself invidious or unconstitutional. Rather, the critical test is whether the differential in cost has a rational basis. *Baldwin*, 436 U.S. 371, 390-91, 98 S.Ct. 1852, 1863-64, 56 L.Ed.2d 354, 369-70. Moreover, where a local public entity has recreational resources which are finite, it has a justifiable interest in favoring the utilization of those resources by its residents over nonresidents. Plainly, harbor moorings are a finite and indeed scarce resource of the Chicago Park District.

Under the circumstances, we believe that the 25% surcharge for nonresidents to obtain moorings merely amounts to a rational basis by which defendant can favor its residents' use of available moorings over nonresidents' use of the moorings. In *Baldwin*, the Court held

that higher-priced hunting licences for nonresidents were "an economic means not unreasonably related to the preservation of a finite resource * * *." 436 U.S. 371, 390, 98 S.Ct. 1852, 1863-64, 56 L.Ed.2d 354, 369. In the present case, the higher-priced moorings for nonresidents is an economic means not unreasonably related to the preservation of a finite resource. Thus, the 25% surcharge for moorings by nonresidents has a rational basis and is not in violation of the Equal Protection Clause of the Fourteenth Amendment.

We therefore conclude that the trial court erred in entering a summary judgment which provided that the statute which permits defendant to charge a higher fee to nonresidents of Chicago is unconstitutional and void. We also conclude that the trial court erred in entering a summary judgment which provides that it is an unconstitutional practice for defendant to add a 25% surcharge on mooring fees to nonresidents of Chicago.

Accordingly, the summary judgment allowing defendant to levy and collect mooring fees in excess of the expenses and costs incurred in connection with related mooring activities is affirmed. The summary judgment which provides that the statute which permits defendant to charge a higher fee to nonresidents of Chicago is unconstitutional and void is reversed. The summary judgment which provides that it is an unconstitutional practice for defendant to add a 25% surcharge on mooring fees to nonresidents of Chicago is also reversed. This case is remanded for the entry of appropriate orders and judgments.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

WHITE, P.J., and McNAMARA, J., concur.

APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT –
LAW DIVISION/MISC. SECTION

Thomas E. Broeckl, James A. Brown and Robert D. Phelps III, individually and on behalf of those similarly situated,	)	
Plaintiffs,	)	No. 84 L 50530
vs.	)	*CLASS ACTION*
The Chicago Park District, a unit of local government,	)	
Defendant.	)	

ORDER

THIS CAUSE coming on to be heard upon the Plaintiffs': a) Complaint; b) the amendments thereto; c) Motion for Martial Summary Judgment on liability and supporting memorandum; d) Motion for Class Certification and memorandum in support thereof; e) Petition for Reconsideration; and f) all exhibits and affidavits in support of the foregoing; and the Defendant's a) Motion for Summary Judgment and memorandum in support thereof; b) Motion to Reconsider; plus the Plaintiffs' answer and reply in opposition to Defendant's Motion to Reconsider; and the Court having reviewed all of the foregoing and having heard oral arguments on July 31, 1985 and September 13, 1985, and being otherwise fully advised in the premises from the foregoing:

Findings

The Court incorporates all of its findings set forth in the hearings held on July 31, 1985 and September 13, 1985, including, but not limited to the following:

1. The Chicago Park District has conceded it makes a profit from 100 to 500 per cent on the fees charged boat owners (the fees) for the privileges of mooring their boats in the Park District administered facilities.

2. The aforesaid fees charged by the Park District exceed the cost of furnishing the services supplied by the Park District in the operation of harbors.

3. Non-residents of the Chicago Park District have been charged a 25% higher fee than residents of the Chicago Park District for the same services; this artificial distinction between resident and non-resident is discriminatory, arbitrary, capricious and unreasonable.

4. The Chicago Park District has a right to charge such fees as the yachtsman will pay and use excess funds to subsidize other Park District facilities.

IT IS HEREBY ORDERED:

1. Defendant's Motion for Summary Judgment is granted in part and denied in part as set forth below.

2. Defendant's Motion for Reconsideration and all relief sought therein is denied.

3. Plaintiffs' Motion for Partial Summary Judgment on liability is granted in part and denied in part as set forth below.

4. Plaintiffs' Petition for Reconsideration is granted in part and denied in part as set forth below;

5. Plaintiffs' amendments to the Complaint to conform the pleadings to the proofs is granted, as set forth in the Plaintiffs' Amendments to the Complaint.

6. Plaintiffs' Motion for Class Certification covering the time period alleged in the Complaint, amendments thereto and as further provided herein, is granted and the Court certifies the class, with counsel for Plaintiffs being designated as lead counsel, to consist of the following:

> a. All persons, individuals or other entities (i.e. mooring owners-holders) who paid mooring or docking fees to the Chicago Park District, directly or indirectly.

7. Notice to the class is hereby stayed pending the appeal and ultimate disposition of this Order.

8. The Court, although requested by Plaintiffs, does not, at this juncture, establish a fund or depository, but does order and direct the Chicago Park District to keep records of the mooring holders with respect to the residency or non-residency as of the year the mooring fees were paid or the moorings were purchased, commencing for the yachting year of 1984 through the ultimate disposition of this case.

9. Defendant shall maintain, and not destroy, all records previously the subject of prior discovery orders, including those covering the period of time alleged in the complaint and amendments thereto.

10. The Court's prior order entered verbally on July 31, 1985, is re-affirmed, said order being identified as follows:

> a. The surcharge of 25% levied against and collected from non-residents of the Chicago Park District in the above class is hereby declared unconstitutional, void and illegal, and that the provision of the Statute (Ch. 105, Section 333.23n(g) which permits the Chicago Park District to charge a fee to non-residents higher than a fee to a resident of the Park District is unconstitutional and void, and the foregoing shall continue in effect and apply for each succeeding year hereafter.

11. The fees charged by the Chicago Park District and collected for the rental of moorings and used to subsidize other facilities and services offered by the Park District is a proper and appropriate use of the funds.

12. All payments and the relief requested for the period alleged in the Complaint and amendments thereto, which have been made or received or will, in the future, be made or received, from any member of the class, shall be subject to this Order and subject to any subsequent order or ruling by the Appellate or Supreme Court or upon the ultimate disposition of this matter.

13. The Court reserves its ruling on whether its Order shall be applied retroactively to the time period embraced by the Complaint and amendments thereto, and subject to any subsequent order or ruling by the Appellate or Supreme Court or upon the ultimate disposition of this matter.

14. The Court further orders and finds that the above Order involves a question of law as to which there

is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation.

15. There is no just reason to delay enforcement or appeal.

JUDGE ARTHUR L. DUNNE

ENTER OCT 7 – 1985
CIRCUIT COURT – 613
Judge

Dated: ___, 1985

APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT –
LAW DIVISION/MISC. SECTION

Thomas E. Broeckl, James A. Brown and Robert D. Phelps III, individually and on behalf of those similarly situated,	)	
Plaintiffs,	)	No. 84 L 50530
vs.	)	*CLASS ACTION*
The Chicago Park District, a unit of local government,	)	
Defendant.	)	

COMPLAINT RESTATED TO INCLUDE AMENDMENTS

Now comes Thomas E. Broeckl, James A. Brown and Robert D. Phelps III on their own behalf and on behalf of a class of all other persons similarly situated, plaintiffs herein, by their attorneys, Craig E. Anderson, Lowell H. Jacobson, Herbert I. Rothbart and Allen D. Choka, to seek a declaratory judgment and other relief and to complain of the defendant, the Chicago Park District as follows:

1. That the named plaintiffs all own watercraft used for recreational purposes, and have paid user fees, including, but not limited to, mooring/docking fees, to the Chicago Park District as hereinafter alleged.

2. That the defendant, Chicago Park District, is a unit of local government located in Cook County, Illinois existing and operating under the laws and Constitution of the State of Illinois, and is not a Home Rule Unit under the laws or Constitution of the State of Illinois.

3. That the named plaintiffs bring this action on behalf of all persons who have paid user fees, including, but not limited to, mooring/docking fees for harbor and related facilities to, and operated by, the Chicago Park District, during each of the years from 1974 to date, who are similarly situated as a class and as representatives of such persons as a class. The members of the class are so numerous as to make it impractical to bring them all before the Court. Except as to the amount of damages each member of the class has sustained, questions of law and fact common to the class predominate over any questions affecting individual plaintiffs. This class action is superior to other methods for the fair and efficient adjudication of the controversy herein described. The claims of the plaintiffs are typical of those to be asserted for the class. The plaintiffs will fairly and adequately represent and protect the interests of the class. Plaintiffs' attorneys are experienced trial counsel who have appeared on behalf of, and in connection with class actions in other lawsuits.

4. That the Chicago Park District sets and charges user fees, including, but not limited to, mooring/docking fees and other harbor services fees pursuant to the Illinois Statutes and Rules and Ordinances Regulating Use of Harbors promulgated by the Chicago Park District, including, but not limited to Ill. Rev. Stats. Chap. 105, Sec. 33.23n(g) and Sec. 30-3.1 et. seq. of the Chicago Park District Code.

5. That the public policy of the State of Illinois is that all parks shall be free to the public and no charges can be made for the use of park property, including

harbor facilities, unless it is for a special facility. Providing special recreational facilities by the Chicago Park District, including, but not limited to, harbors and related facilities is a governmental function of the Chicago Park District. The fees charged by the Chicago Park District for the use of such special recreational facilities are limited to a charge that will bear some reasonable relation to the additional burdens imposed and the necessary expenses involved in supervision thereof, and they shall not be discriminatory as between residents and non-residents of the Chicago Park District.

6. That the governmental powers granted to the Chicago Park District include, but are not limited to, Ill. Rev. Stat. Ch. 105 § 333.23n, adopted in 1982 which reads in part as follows:

> "The Chicago Park District, to carry out the purposes of this section, has all the rights and powers over its harbors as it does over its other property, and its rights and powers include but are not limited to the following:
>
> (a) To furnish complete harbor facilities and services, including but not limited to: launching, mooring, docking, storing . . .
>
> * * *
>
> (f) To license, regulate, and control the use and operation of the harbor, including the operation of all water-borne vessels in the harbor, or otherwise within the jurisdiction of the Chicago Park District.
>
> (g) To establish and collect fees for all facilities, and services, and compensation for materials furnished. Fees charged non-residents of such district need not be the

> same as fees charged to residents of the district."

That the adoption of Ill. Rev. Stats. Ch. 105, Sec. 333.23n confirmed the long standing proposition that providing mooring facilities by the Chicago Park District is a governmental function, as set forth in the Supreme Court of Illinois holding in the case of *MacNeil v. Chicago Park District*, 401 Ill. 556, 563, 82 N.E. 452 (1948). Recognition of the foregoing is confirmed by the defendant's adoption of Section 30-8 in the Chicago Park District code as follows:

> "Fees for use of park facilities.
>
> The park board or the general superintendent may fix and collect reasonable fees for the use of park facilities. Such fees may be fixed at a uniform rate to all users of such facility or facilities."

7. That fees charged by the Chicago Park District in providing a governmental function must be reasonable and related to its costs, as set forth in Paragraph 5 above; but notwithstanding this, the fees charged by the Chicago Park District during the relevant time period were excessive, oppressive, were not reasonable, discriminatory, arbitrary and capricious as between residents and non-residents of the Chicago Park District, confiscatory and bore no reasonable relation to the costs. An admission of the foregoing by the defendant is the affidavit by the Comptroller for the defendant confirming that the fees charged for years noted therein were not reasonably related to the costs, said affidavit disclosing that the harbor revenue exceeded the harbor expenses between 500% and 600%, or approximately an excess of between

$2,000,000 and $2,500,000. (a copy of the affidavit identified as Exhibit A is attached hereto and made a part hereof); and a further example of the foregoing is the 25% surcharge imposed on the fees charged and collected from non-residents of the Chicago Park District in excess of the fees charged residents of the Chicago Park District.

8. That the foregoing actions of the defendant deprives the plaintiffs of their property without due process under the Constitution of the United States and the State of Illinois; and the law of the State of Illinois, including, but not limited to, violating:

(a) the equal protection clause of the Fourteenth Amendment of the Constitution of the United States;

(b) the privileges and immunities clause of Article 4, Section 2 of the Constitution of the United States;

(c) Article 1, Section 2 of the Constitution of the State of Illinois;

(d) Article 7, Sections 1 and 8 of the Constitution of the State of Illinois; and

(e) Ill. Rev. Stat. Ch. 105, Section 333.19, which limits the power of the Chicago Park District to the taxing of real estate and thereby precludes defendant's power to license for revenue.

9. That this is a case of actual controversy in which the Court may make a declaratory judgment determining the Rules and Ordinances of the Chicago Park District Regulating Use of Harbors violates existing law and the Federal and State of Illinois Constitutions, pursuant to the Illinois Code of Civil Procedure.

WHEREFORE, plaintiffs request that this Court:

A. Declare that the actions carried out by the defendant as alleged herein were and are in violation of the Constitution of the United States; Constitution of the State of Illinois; the laws of the State of Illinois and the ordinances and Code of the Chicago Park District and, are unconstitutional as applied to the ordinances and rules of the Chicago Park District regulating the use of harbors as alleged aforesaid.

B. Certify a class and designate counsel for plaintiffs as lead counsel.

C. Award damages to the plaintiffs and the class in an amount to be determined for the conduct herein complained of for the period alleged above from 1974 to date and the future, for so long as said conduct continues; and the establishment of a depository for all funds paid or to be paid in the future until the ultimate disposition of this cause.

D. Order that an accounting be made to determine the sum and substance of the violations herein charged.

E. Order payment for the costs of prosecution of this matter and for reasonable attorneys fees.

F. Grant plaintiffs such other and further relief as is appropriate.

Thomas E. Broeckl, et al

By: _____
One of their attorneys.

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EXHIBIT A

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

AFFIDAVIT

I, Joseph Fratto, hereby sworn on oath state that the following is true:

1. That I am the Comptroller for the Chicago Park District.

2. That the harbor revenues are a major component of the District's total corporate non-tax revenues as indicated in the following:

Year	Harbor Revenue	Total Non-Tax Revenue	%-Harbor Total	Harbor Expenses
1981	$2,750,887	$19,253,660	14.29	$463,675
1982	3,296,955	21,303,615	15.48	507,769
1983**	3,536,923	20,048,123	17.64	505,306
1984***	3,400,000	19,704,688	17.25	577,597

* Includes recurring revenues only, excluding all one-time sources.

** 1983 figures are unaudited

*** 1984 budgeted figures

3. That due to the financial burden of a fifty percent (50%) surcharge it could reasonably be expected that the affordability of the District's moorings will be such that a loss of existing boaters will occur.

4. That with the proposed expansion of Waukegan and Wilmetter harbors, it is feasible to predict that Park District boaters will eventually move to these cheaper facilities, because the District will no longer be price competitive with other harbor facilities.

5. That it is believed that the potential loss of boaters cannot be adequately replaced from waiting lists of new mooring applicants because these lists have been substantially reduced through the expansion of our harbor facilities.

6. That harbor expansion and waiting lists or new applicants have developed as follows:

HARBOR CAPACITY

	1983	1982	1981	1980	1979	1978
Star Docks	1,837	1,472	1,376	1,544	864	156
Ships and Docks	1,070	1,062	1,087	1,047	1,047	1,038
Moorings						
Wet	1,793	1,774	1,788	1,639	1,709	2,000
Dry	246	365	365	285	285	285
Sailing Dinghy Spaces	39	39	39	119	119	127
Wall Spaces	105	66	74	60	60	68
	5,090	4,778	4,729	4,694	4,084	3,674

MOORING WAITING LIST

April 15, 1983	345
April 15, 1982	508
April 15, 1981	859
April 15, 1980	800
April 15, 1979	1,050
April 15, 1978	950
April 15, 1977	1,200

7. That harbor revenues must be maintained in order to avoid park service cutbacks which may be required to offset any revenue loss.

8. That approximately fourteen percent (14%) of all available boat moorings were financed with revenue bonds, the agreement of which outlines specific responsibilities of the District including the maintenance of adequate revenues from which these bonds will be repaid. In addition thereto, the District is required to keep revenues sufficient to adequately maintain and operate the harbor facilities covered by the agreement.

9. That the proposed fifty percent (50%) surcharge could seriously restrict the District from performing its various responsibilities relating to the existing revenue and agreements. The financial data for the Harbor Revenue Fund is as follows:

Year	Harbor Revenues	Expenses	Principal and Interest due	Bonds Outstanding
1981	$250,425	$100,003	$132,750	$1,475,000
1982	239,446	111,740	182,800	1,420,000
1983**	222,810	110,000	172,200	2,220,000
1984***	370,500	185,000	292,000	2,150,000

** 1983 figures are unaudited

*** 1984 budgeted figures

/s/ Joseph Fratto
Joseph Fratto

Subscribed and Sworn to before me
this 10th day of February, 1984.

/s/
NOTARY PUBLIC

SEAL

APPENDIX E

ADMINISTRATION BUILDING
425 East McFetridge Drive
Chicago, Illinois 60605
Telephone
294-2200

December, 1988

Dear Harbor Patron,

As the Director of Harbors appointed in 1987, I thank you for your patience, your ideas, and your support as the New Park District Administration under Jesse D. Madison seeks to restore our unique harbor system to preeminence. In 1987 and 1988 the Marine Department was restructured, the mooring assignment procedures changed, and plans both short and long range were implemented . . . which brings us to 1989.

Yes there is a fee increase. There has not been one since 1982. The City of Chicago's 50% Boat Mooring Tax crippled the Park District's ability to raise fees since 1984. But beginning January 1989, the BOAT MOORING TAX is abolished. The 1989 fee increase is different from all previous increases. All of the increase revenues will be placed in a Harbor Improvement Fund to be spent in the harbors, not on salaries, but on maintenance, upgrading of facilities, and security. Approximately 1 million dollars annually will be so spent. Some examples are:

Purchase of proper uprights, pipe & plastic railings, sandblasting & coating of decking.

Replacement of aging electrical panels.

Conversion of navigation lights from battery power to 110 volts.

Installation of wrought iron security gates and fences.

General rehabilitation and paving of dry mooring areas.

Improved signage with emphasis on information.

Replacement of existing steel buoys with state of the art heavy plastic buoys which will not damage boat hulls.

Of course not all the above can be done at once and in all harbors, but beginning in 1989, some improvements will occur in all harbors. In addition here is a list of projects already funded from non-harbor fee sources to be completed in 1989:

Burnham Harbor Comfort Station with Fish Cleaning facility on the west side, including showers for boaters, expanded charter office, and large dockside deck with restaurant concession.

Restoration of the Jackson Park Coast Guard Station into a multi-purpose boating facility with showers for boaters, etc..

Belmont Dinghy Dock Rehabilitation with complete new dock area and vertical racks.

Replacement of 7 floating docks in 59th St. Harbor and 12 in Belmont Harbor.

Purchase of security vehicles to make patrols easier and more visible in our harbors.

Re-paving of Diversey Harbor parking lot.

ALL BOATERS WILL RECEIVE FREE PARKING AS PART OF THE FEE INCREASE! That's right, each boatowner will receive ONE free parking card for that harbor he or

she is assigned, including Monroe Street's underground garage.

MONROE BOATOWNERS AND ONE GUEST WILL RECEIVE FREE PASSAGE ON THE TENDER SERVICE! Monroe boaters will note a surcharge on their fee which will provide a new Park District operated Tender service with 6 proper 26 passenger launches and 3 to 4 pick up locations.

That in brief is what to expect in 1989. As Director and as a lifelong sailor, I promise you not only improvements but plans for additional harbors such as the Turning Basin Marina now under way. I am committed to restoring our boating community to the best in the country.

Fairwinds,

/s/ Robert J. Nelson

Supreme Court, U.S.
FILED
FEB 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1146

In The
Supreme Court of the United States
October Term, 1989

THOMAS E. BROECKL, JAMES A. BROWN AND ROBERT D. PHELPS III, INDIVIDUALLY, AND ON BEHALF OF THOSE SIMILARLY SITUATED,
Petitioners

v.

THE CHICAGO PARK DISTRICT, A UNIT OF LOCAL GOVERNMENT,
Respondent

BRIEF FOR THE CHICAGO PARK DISTRICT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

GEORGE F. GALLAND, JR.
DAVIS, MINER, BARNHILL & GALLAND, P.C.
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Chicago, Illinois 60610
(312) 751-1170

Counsel for Respondent

American Reprographics Management, Inc.™ (312) 332-2764

55pp

QUESTIONS PRESENTED

1. Whether petitioners have waived their right to have this Court review the constitutionality of a municipal fee system under the Fourteenth Amendment's Equal Protection Clause, when petitioners deliberately refrained in the courts below from relying on that Clause and instead based their equal protection claim solely on the Illinois Constitution's equal protection provision.

2. Whether the Illinois Supreme Court correctly held that the Chicago Park District has a rational basis for charging nonresidents of Chicago a higher price than it charges residents to rent recreational boat moorings in the District's harbors.

3. Whether petitioners' "public trust doctrine" theory presents any federal question so as to invoke the appellate jurisdiction of this Court.

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No. 89-1146

In The

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October Term, 1989

THOMAS E. BROECKL, JAMES A. BROWN AND ROBERT D. PHELPS III, INDIVIDUALLY, AND ON BEHALF OF THOSE SIMILARLY SITUATED,
Petitioners

v.

THE CHICAGO PARK DISTRICT, A UNIT OF LOCAL GOVERNMENT,
Respondent

BRIEF FOR THE CHICAGO PARK DISTRICT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

The judgment of the Illinois Supreme Court was entered on September 20, 1989. Petitioners purport to base jurisdiction of this Court on 28 U.S.C. §1257(a), which gives this Court jurisdiction to review State court final judgments construing the constitutionality of a State statute under the federal Constitution.

Respondent Chicago Park District denies that this Court has jurisdiction. The petition purports to seek this Court's review of

the constitutionality of an Illinois statute (1) under the Fourteenth Amendment's Equal Protection Clause, and (2) under the Illinois "public trust doctrine." The District's position is that by failing to make their Fourteenth Amendment claim in the courts below, petitioners waived their right to present it to this Court. The District further asserts that petitioners' "public trust doctrine" claim presents no federal question.

STATEMENT OF THE CASE

Petitioners filed this class action in an Illinois State court to challenge the fees charged by the Chicago Park District for renting boat moorings in the District's recreational harbors along Lake Michigan. Petitioners presented two challenges to the fees. First, petitioners asserted that the District was required to set the level of the fees at "cost." The "at cost" claim, which petitioners lost, invoked only Illinois law and is not asserted in the petition. Second, petitioners challenged the District's 25% fee surcharge for nonresidents of Chicago. The trial court held this surcharge unconstitutional, but the Appellate Court of Illinois reversed, and the Supreme Court of Illinois affirmed the Appellate Court. Petitioners seek this Court's review.

The facts are not disputed. The Chicago Park District is an Illinois municipal corporation. It owns and operates Chicago's park system. The District finances its operations primarily by taxes levied on property within the city limits of Chicago. Ill.Rev.Stat. ch. 105, §§333.19, 333.39.

The Illinois legislature has authorized the District to construct recreational boat harbors along Lake Michigan and to charge boaters for the use of harbor facilities. *Id.*, §333.23n. The same statute provides that "fees charged to nonresidents need not be the same as fees charged to residents of the district." *Id.*, §333.23n(g). Pursuant to this authorization, the District has constructed over 5,000 boat moorings in eight recreational harbors. It rents those moorings to boaters on a seasonal basis. Its fee levels are competitive with those of other marinas on Lake Michigan. To the basic seasonal fee, the District adds a 25% surcharge (the "nonresident surcharge") for nonresidents of Chicago. This price distinction is the only measure taken by the District to promote its own residents' access to its harbor

moorings. Notwithstanding the surcharge, about half the moorings have been rented by nonresidents of Chicago.

Petitioners' complaint in the trial court listed various federal and Illinois constitutional provisions that were allegedly violated by the nonresident surcharge. Among these, petitioners listed the federal Constitution's Privileges and Immunities Clause, Art. IV, §2; the Fourteenth Amendment's Equal Protection Clause; and various provisions of the Illinois Constitution. Petition 33a.

The complaint's single mention of the federal Equal Protection Clause was the last time petitioners invoked that Clause in this litigation until they filed their petition for *certiorari* in this Court. Although their complaint mentioned the Equal Protection Clause, the only federal constitutional provision actually argued by petitioners to the trial court was the Privileges and Immunities Clause. On October 7, 1985, the trial court held unconstitutional the nonresident surcharge and the statute authorizing it. The court did not state what provision of what Constitution the surcharge offended. Petition 27a.

The District appealed this ruling to the Illinois Appellate Court. In defending the trial court's ruling, petitioners did not argue that the nonresident surcharge offended the federal Equal Protection Clause. As in the trial court, the only federal constitutional provision petitioners argued in the Appellate Court was the Privileges and Immunities Clause. The Appellate Court, reversing the trial court, upheld the constitutionality of the nonresident surcharge. *Broeckl v. Chicago Park District*, 170 Ill.App.3d 1063, 524 N.E.2d 1045 (1st Dist. 1988), Petition 14a-23a.

Petitioners appealed to the Illinois Supreme Court. Once again, the only federal constitutional provision invoked by petitioners was the Privileges and Immunities Clause. Petitioners' briefs in the Illinois Supreme Court did not argue, or even mention, the federal Equal Protection Clause. (The relevant sections of those briefs are reprinted as an appendix to this brief.) Petitioners made an equal protection argument, but expressly limited that argument to the equal protection guarantee contained in the Illinois Constitution. See pp. 12a-15a and 33a-35a, *infra*.

The Illinois Supreme Court affirmed the Appellate Court's ruling upholding the constitutionality of the nonresident surcharge. *Broeckl v. Chicago Park District,* ___ Ill.2d ___, 544 N.E.2d 792 (1989), Petition 1a-13a. First, the court held that as Illinois residents, petitioners had no standing to invoke the federal Constitution's Privileges and Immunities Clause. 544 N.E.2d at 110, Petition 10a. Second, the court rejected petitioners' equal protection challenge. Although petitioners had based their equal protection argument only on the Illinois constitutional provision, the court stated that the surcharge was constitutional not only under that provision but under the federal Equal Protection Clause as well. *Id.* at 111, Petition 11a-12a. Third, the court rejected petitioners' contention that the surcharge violated the Illinois "public trust doctrine." *Id.* at 111, Petition 12a.

REASONS FOR DENYING THE PETITION

There are three reasons to deny this petition. First, petitioners have waived their claim that the nonresident surcharge violates the Fourteenth Amendment's Equal Protection Clause, because they failed to present that claim in the courts below. Second, aside from being waived, petitioners' equal protection arguments present no issue worth this Court's review. Third, the other theory offered by petitioners – that the nonresident surcharge violates the "public trust doctrine" – presents no federal question, but is an issue of Illinois law.

A. Petitioners Have Waived Their Federal Equal Protection Argument

In the Appellate Court and Supreme Court of Illinois, petitioners carefully avoided relying on the Fourteenth Amendment's Equal Protection Clause. Instead, they limited their equal protection argument to the Illinois Constitution's equal protection guarantee. This decision was a deliberate gamble. Petitioners hoped that the Illinois Supreme Court would avoid relying on the federal Constitution and would instead strike down the surcharge under the Illinois Constitution. Such a result, resting solely on a State constitutional guarantee, could have insulated petitioners from further review by this Court. See *Michigan v. Long,* 463 U.S. 1032, 1040-1041 (1983).

However, petitioners' gamble failed. They lost in the Illinois Supreme Court. They now want this Court to review the *federal* equal protection claim that for tactical reasons they suppressed below.

Such a tactic is impermissible. To have this Court review their federal equal protection claim, petitioners must have "adequately presented" that claim in the State courts. *Webb v. Webb,* 451 U.S. 493, 496-497 (1983). Petitioners did not present, much less "adequately present," their federal equal protection claim in the Illinois courts. To the contrary, in the Illinois Appellate and Supreme Courts, they suppressed that claim. They thereby waived their right to present the federal claim to this Court. See *Bankers Life & Cas. Co. v. Crenshaw,* ___ U.S. ___, 108 S.Ct. 1645, 1650 (1988): "At the minimum, there should be no doubt from the record that a claim under a federal statute or the *federal* Constitution was presented in the State courts . . ." (emphasis in original).

Any other holding would place litigants in a posture of "heads I win, tails you lose." Litigants like petitioners could bring equal protection challenges based solely on State constitutional guarantees, knowing that if they win, they could prevent review by this Court, but that if they lose, they could switch to an analogous federal theory and get review by this Court.

In rejecting petitioners' Illinois equal protection claim, the Illinois Supreme Court stated that the nonresident surcharge also passed muster under the federal Equal Protection Clause as well. Petition, 11a. This comment is a pure example of a *dictum:* a statement seeming to decide a claim that petitioners had deliberately refrained from asking the court to decide. Such a *dictum* does not change the fact that petitioners deliberately avoided relying on the federal Equal Protection Clause in the courts below. That conduct waived their right to obtain review under the Clause in this Court. That waiver is not excused by the Illinois Supreme Court's reference to the federal Clause in its decision.

B. Petitioners' New Federal Equal Protection Claim Has No Merit in Any Case

Petitioners' claim under the federal Equal Protection Clause would have no merit even if it had been preserved for review.

Classifications based on residency pass equal protection muster if they have any rational basis. *Martinez v. Bynum*, 461 U.S. 321, 325-326 (1983); *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 379 (1979). As the Illinois Supreme Court held, the surcharge is supported by an eminently rational basis.

First, the surcharge rationally helps the District promote its own residents' access to scarce harbor moorings. This Court has repeatedly held that when a governmental jurisdiction constructs facilities for public use, it has a rational basis under the Equal Protection Clause for favoring its own residents' use of those facilities. *Vlandis v. Kline*, 412 U.S. 441, 452-453 (1973); *Martinez v. Bynum*, 461 U.S. 321, 328 (1983). On similar grounds, in *Baldwin v. Fish & Game Commission of Montana, supra*, this Court held that the state of Montana had a rational basis for preserving its own citizens' access to the finite supply of elk in the State. 436 U.S. at 388-390. This Court therefore rejected an Equal Protection Clause attack on Montana's huge nonresident surcharge on hunting licenses for elk.

Vlandis, *Martinez*, and *Baldwin* demolish plaintiffs' equal protection claim. As the Illinois Supreme Court noted, the District's harbor moorings are a finite resource. Just as a school district may constitutionally favor its own children's access to limited school facilities (*Martinez*), and just as Montana may constitutionally use fee distinctions to preserve the state's finite game supply for the benefit of its own residents (*Baldwin*), the Chicago Park District may constitutionally impose a modest surcharge on nonresidents as an allocation device to preserve its own residents' access to the finite supply of harbor moorings.

Second, the nonresident surcharge is a rational method of compensating for nonresidents' lesser contribution to the physical and administrative infrastructure that makes the harbors possible. This Court has repeatedly affirmed lower courts who

upheld, using this rationale, the constitutionality of nonresident surcharges. See *Starns v. Malkerson*, 401 U.S. 985 (1971), *summarily affirming* 326 F.Supp. 234 (D.Minn. 1970) (three-judge court); *Sturgis v. Washington*, 414 U.S. 1057 (1970), *summarily affirming* 368 F.Supp. 38 (N.D. Wash. 1973) (three-judge court). In *Baldwin, supra*, this Court noted that Montana's 2,500% nonresident surcharge for elk hunting licenses could be justified, among other reasons, on this ground. This Court wrote that only Montana residents contributed, with their taxes, to the infrastructure that made elk hunting possible. 436 U.S. at 389.

As the Illinois Supreme Court held, this rationale justifies the nonresident surcharge. The Chicago Park District's harbors are embedded in, and depend on, a magnificent park system that Chicago residents support with their taxes and nonresidents do not. Moreover, the taxes paid by Chicago's residents support not only this physical infrastructure, but also an expensive administrative infrastructure. The harbors demand continuous attention from the District's top management, its financial officers, its Department of Personnel, its Law Department, its construction tradesmen, its security department, and more. The nonresident surcharge rationally helps compensate for the fact that Chicago residents' taxes support this infrastructure.

Petitioners' arguments against these rational bases for the mooring surcharge have no merit. First, petitioners claim that this Court has held that "a state cannot discriminate between its citizens based soley [*sic*] on past payment of real estate taxes." Petition at 12, citing *Shapiro v. Thompson*, 394 U.S. 618 (1968). *Shapiro* holds no such thing. It involved a challenge not to a *bona fide* residency requirement, but to a *durational* residency requirement for receiving welfare benefits. *Bona fide* residency requirements base distinctions on where people live; durational residency requirements base distinctions on how long people have lived where they do. Unlike *bona fide* residency requirements, durational residency requirements sometimes implicate the right to travel, as the requirement did in *Shapiro*. They therefore can be subjected to a higher standard of scrutiny under the Equal Protection Clause. *Martinez v. Bynum, supra*, 461 U.S. at 325-326, 328 n.7. Using this heightened standard, *Shapiro* declined to sustain a durational residency requirement for welfare on the

ground that the plaintiffs had not paid past taxes in the jurisdiction affording the benefits.

But as to *bona fide* residency requirements, things are different. This Court routinely upholds *bona fide* residency requirements on the rationale that residents pay more to support local facilities and services than nonresidents pay. See *Martinez v. Bynum, supra,* 461 U.S. at 325-329, which refused to apply the holding of *Shapiro v. Thompson* to a *bona fide* residency requirement that charged tuition to nonresident schoolchildren but not to resident schoolchildren.

Second, petitioners claim that a municipality may not constitutionally favor its own residents' use of "public property" over nonresidents'. Petition at 14. No citation is given for this assertion; none exists. *Martinez* and other cases hold precisely the opposite. See, e.g., *County Board of Arlington, Va. v. Richards,* 434 U.S. 5, 7 (1977), which upheld a municipal ordinance that denied nonresidents the right to park on certain streets.

Third, even though this Court's decisions recognize the District's interest in promoting its own citizens' access to scarce facilities, petitioners claim that "rather than being scarce and limited facilities, the moorings are an expanding asset." Petition at 15. Petitioners ask this Court to take "judicial notice" of a flyer in which the District discusses a plan to increase the number of moorings. Petitioners airily claim that there are "unused miles and miles" of Lake Michigan shoreline where new harbors could be built.

It is hard to imagine a poorer argument. While the District may build more moorings in the future, those moorings will continue to be limited-capacity facilities whose supply is exceeded by the demand for them. Indeed, it is the heavy demand for these scarce moorings that may induce the District to undertake the huge investment needed to build new harbors. The record in this case shows that demand for these moorings has substantially exceeded the supply, resulting in waiting lists. Petition at 37a. Nothing in the record suggests that this will not continue to be true. So long as it is, the District may legitimately take steps to keep its own citizens from being crowded out of the harbors by nonresident boaters. The allocation measure it has

thus far chosen — a modest price break to Chicago residents — is a highly rational means of carrying out this permissible government objective.

Fourth, petitioners try to distinguish *Baldwin* by arguing that its rationale is applicable only to discrimination by States against citizens of another State. Petition at 16. Nothing in *Baldwin* supports this reading. Petitioners confuse *Baldwin's* discussion of the Equal Protection Clause with its entirely separate discussion of the Privileges and Immunities Clause. The Court's discussion of the Privileges and Immunities Clause necessarily focused on State discrimination against citizens of other States, since that is the only kind of discrimination that the Clause deals with. But in discussing the validity of Montana's nonresident surcharge under the Equal Protection Clause, this Court upheld the surcharge for reasons that are applicable to residency requirements imposed by any level of government, whether federal, state, or local. 436 U.S. at 389. And other decisions of this Court have applied the equal protection principles discussed in *Baldwin* to residency discrimination by municipalities. See *Martinez v. Bynum, supra.*

Fifth, petitioners suggest that upholding the District's nonresident surcharge will invite municipalities to use such surcharges to discriminate on the basis of race. Petition at 18. The answer to this argument is that petitioners have never alleged that the Chicago Park District imposes its nonresident mooring surcharge for that purpose.

Sixth, petitioners say that an Illinois constitutional provision known as the "Uniform Fees" clause requires this Court to treat residency as a "suspect" classification, and therefore requires the nonresident surcharge to be subjected to "strict scrutiny" under the federal Equal Protection Clause. Petition at 17, 20-21. No authority or logic supports this attempt to have the Illinois tail wag the federal dog. Federal law, not State law, dictates which classifications are "suspect" under the Fourteenth Amendment. As discussed above, *bona fide* residency is not a "suspect" criterion under the Equal Protection Clause. It implicates no "fundamental right" and receives only the usual "rational-basis" review under the Clause. As the Illinois Supreme

Court rightly held, the District's nonresident surcharge easily passes that review.

C. Petitioners' "Public Trust Doctrine" Argument Presents No Federal Claim

The Illinois Supreme Court rejected petitioners' argument that the nonresident surcharge violates Illinois' "public trust doctrine." Petitioners seek this Court's review of that holding, claiming that it "conflicts" with holdings by courts in other States. Petition at 18-19. However, the holding is purely one of Illinois law, so that this Court has no appellate jurisdiction to review it.

The "public trust doctrine" originated in the common law. Under English common law, title to lands under navigable or tidal waters was held by the King in trust for public use. In America, title to such lands passed after independence to the United States, subject to the same public trust. This Court held early on that when States were admitted to statehood, they acquired title to these "public trust lands," subject to a paramount "navigational servitude" in favor of the United States to insure that they remain available for navigation. See *Phillips Petroleum Co. v. Mississippi*, ___ U.S. ___, 108 S.Ct. 791, 796 (1988); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375-376 (1977).

Once a State has acquired title to public trust lands, federal law in general ceases to govern the use of those lands. In *Oregon v. Corvallis Sand & Gravel Co., supra*, this Court held that issues of ownership of a State's public trust lands are governed by the law of the State, not by federal common law. And this Court has long made it clear that "the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." See *Phillips Petroleum Co. v. Mississippi, supra*, 108 S.Ct. at 794.

Federal law impinges on State-owned public trust lands in only two limited particulars. First, such lands remain subject to a "navigational servitude" in favor of the United States. See *Gibson v. United States*, 166 U.S. 269, 271-272 (1897). Second, in land title disputes between States and private citizens, it is sometimes necessary to determine whether certain lands were

in fact public trust lands owned by the United States at the time Congress passed the statehood act admitting the State in question. If they were, then the State acquired title to them through the federal statehood act, and the private claimants lose. *See, e.g., Phillips Petroleum Co. v. Mississippi, supra.*

Neither of these federal issues, of course, is involved in this lawsuit. No one claims that the Chicago Park District's price structure for the seasonal rental of boat moorings interferes with the paramount right of the United States to assure the continued navigability of Lake Michigan. And this case raises no issue of whether title to the lands underlying the District's harbors did or did not pass to Illinois by virtue of the federal act admitting Illinois to statehood. Accordingly, while the lands underlying the District's harbors are "public trust lands," no federal issue is raised by their status as such.

In invoking the "public trust doctrine," petitioners mistake a state-law doctrine for a federal one. Over the years, a number of State courts have had occasion to decide what uses of public trust lands owned by the State in question (or a municipality of that State) serve the "public trust." See, e.g., *People ex rel. Scott v. Chicago Park District,* 66 Ill.2d 65, 360 N.E.2d 773 (1976); *Borough of Neptune City v. Borough of Avon-By-The-Sea,* 294 A.2d 47, 61 N.E.2d 296 (1972). Such decisions have been decided under the law of the particular State in question. These courts have not claimed to be interpreting federal law. They have not claimed to be enforcing a federal standard of what the "public trust" is. Rather, they are defining State-law standards for the use of lands that are owned by the State in question or its political subdivisions.

For this reason, the "conflict" claimed by petitioners between different States' "public trust doctrine" decisions does not involve federal law, and in fact is not a conflict. Instead, these decisions reflect variations in different States' views of what uses of land serve the public trust as each of those States defines that concept. For example, New Jersey thinks that the public trust requires beach fees to be equal for everyone (see *Neptune City, supra*). Illinois thinks that the public trust allows reasonable municipal price distinctions based on residency (see the decision below). Our federal system is designed to allow (and encourage) such

varying views among States. Neither view implicates federal law, much less conflicts with any federal definition of the "public trust."

Petitioners failed to persuade the Illinois Supreme Court that the public trust, as defined by Illinois law, forbids the District's administrative pricing distinction between residents and non-residents of Chicago. This Court has no appellate jurisdiction to review that state-law decision.[1]

CONCLUSION

The District respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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[1] One further argument in the petition deserves only a footnote. Petitioners assert that the Illinois Supreme Court deprived them of federal due process by failing to hold that the nonresident surcharge violates a provision of the Illinois Constitution requiring uniform fees and taxes. Petition at 22-23. This argument unmistakably says that because petitioners lost one of their State constitutional claims, they have been denied federal due process. Not so.

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II.

THE COURT ERRED IN HOLDING THAT THE CHICAGO PARK DISTRICT MAY DISCRIMINATE AGAINST NON-RESIDENTS OF THE DISTRICT BY CHARGING THEM A SURCHARGE

Discrimination by an Illinois Park District against certain citizens of the State of Illinois who are nonresidents of the Park District, contrary to the opinion of the appellate court, is illegal and void under the United States and Illinois Constitutions and under the "Public Trust Doctrine" fashioned by this Court and the appellate courts governing the use of parks in Illinois. The appellate court in its opinion addressed only the federal constitutional aspects of the Plaintiffs' arguments as to the invalidity of the non-resident surcharge imposed by the Chicago Park District. The appellate court erred in its analysis under the United States Constitution but, more disturbingly, the appellate court failed to even address Plaintiffs' arguments under the Illinois Constitution and the case law establishing the Public Trust Doctrine, under which the surcharge was found to be void, illegal, and unconstitutional by the trial court.

A. Residency-Based Discrimination Is Not Permissible Under The United States Constitution Unless It Is Reasonably Related To Some Additional Burdens Imposed By The Non-Residents.

The appellate court based its entire opinion for overturning the trial court's order regarding the non-resident surcharge on *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1979). The *Baldwin* case upheld a Montana hunting license system, which charged non-residents of the state a substanitally higher fee than residents for a license to hunt elk and other game. The *Baldwin* Court discussed at length the relationship between citizens of different states. In discussing the Privileges and Immunities clause, the Court pointed out that its only concern in that decision was with the relationship of residents of one state to another state. *See* 436 U.S. at 380-82. The appellate court's faith in the power of this case is misplaced. The trial court's succinct and accurate summation of its irrelevency was as follows:

> "THE COURT: I don't have any trouble with *Baldwin*. *Baldwin* dealt with non-residents of a state as opposed to residents of a state. The class of people that we are dealing with are all residents and taxpayers of the same state." (R.373, p. 19)

It is obvious from *Baldwin* that the Court there was dealing with the relationship of Citizens of one state with another state. This is not issue in this case. The issue here is whether the Chicago Park District can charge an Illinois citizen who is a resident of, e.g., Wilmette or Evanston, an extra fee for use of its harbor. *Baldwin* is therefore totally irrelevant to a determination of this issue. Even the *Baldwin* Court recognized that the case did not apply to discrimination among residents of the same state when it stated as follows:

> "It appears to have been generally accepted that although the States were obligated to treat all those within their territory equally in most respects, they were not obligated to share those things they held in trust for their own people." 436 U.S. at 384.

Thus, the Court acknowledges that a higher level of scrutiny would attach to discrimination based on residency *within* a state. The U.S. Supreme Court, in a case decided six years later, held that discrimination based upon municipal residency is subject to the "substantial reason" test of the Privileges and Immunities Clause. *United Building and Construction Trades Council of Camden County and Vicinity v. City of Camden*, 465 U.S. 208, 79 L.Ed. 249, 104 S.Ct. 1020 (1984).

Even under the standards of *Baldwin*, however, the non-resident surcharge in the present case must fall. The Supreme Court applied the standard "additional burdens imposed" analysis used in privileges and immunities cases in *Baldwin*. Under the facts of that case, the Court held that the nonresidents' use of Montana hunting facilities *did* create additional burdens on the State of Montana (436 U.S. at 390) which justified a higher fee to be imposed on nonresidents. In the case at bar, there are absolutely no additional burdens imposed on the Chicago Park District in providing moorings to nonresidents, which the appellate court acknowledged. (Op. p. 4).

Furthermore, *Baldwin* does *not* deal with property "held in trust for the equal benefit of all the people" that must *not* be operated "in such a manner that a preferential use thereof is granted to any one person or to any group of persons." *Lincoln Park Traps v. Chicago Park District*, 323 Ill. App. 107, 114, 55 N.E.2d 123 (1944). Finally, the *Baldwin* Court was not confronted with a state constitution which prohibits non-uniform fees. (Illinois Constitution, Art. IX, sec. 2). In fact, as illustrated by the *Baldwin* majority in the quote above, and as clearly expressed by the dissent, a fundamental right long recognized of every citizen is to be treated equally as every other citizen of his or her state by that state in regards to "taxes and impositions." 436 U.S. at 395, 56 L. Ed. at 373 (Brennan, J., dissenting), *quoting* Mr. Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (No. 3,230) (CCED Pa. 1825).

Of even greater import is the decision by the U.S. Supreme Court that holds the Privileges and Immunities Clause applies to laws that discriminate among state residents on the basis of municipal residencey. In *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208, 79 L.Ed.2d 249, 104 S. Ct. 1020 (1984), at issue was the ordinance of Camden, New Jersey, which required that 40% of the employees of contractors working on city projects be Camden residents. The Court specifically addressed the question of whether the Privileges and Immunities Clause of the United States Constitution applied to a municipal ordinance. In holding that it did, the Court said at 79 L.Ed. 256:

> "(A) municipality is merely a political subdivision of the State from which its authority derives. (Citation) It is as true of the Privileges and Immunities Clause of the Equal Protection Clause that what would be unconstitutional if done directly by the State can no more readily be accomplished by a city deriving its authority from the State."

The Court further held that discrimination based on *municipal* residency was equally bad as that based on state residency and that both came under the Privileges and Immunities Clause. The Court said at 79 L.Ed. 257:

> "We have never read the Clause so literally as to apply it only to distinctions based on state citizenship. For example, in *Mullaney v. Anderson*, 342 U.S. 415, 410-420, 96 L.Ed. 458, 72 S. Ct. 428 (1952), the Court held that the Alaska Territory had no more freedom to discrimnate against those not resident in the Territory than did any State to favor its own citizens . . . A person who is not residing in a given State is ipso facto not residing in a city within that State. Thus, whether the exercise of a privilege is conditioned on state residency or on municipal residency he will just as surely be excluded."

The appellate court's holding is without basis in the law and the facts of the case. It sets a dangerous precedent. Can it be seriously doubted that Park Districts throughout the Chicago metropolitan area and the entire State seeking ways to invidiously discriminate against their neighbors welcome the appellate court's opinion with open arms, and cannot hesitate to draw this sword from their sheath? The potential for abuse is enormous.

B. The Court's Opinion Is Contrary To The Equal Protection and Uniform Fees Clauses of The Illinois Constitution.

Article I, Section 2 of the Illinois Constitution of 1970 (the Illlinois Equal Protection Clause") provides as follows:

> "No person shall be deprived by life, liberty or property without due process of law **nor be denied the equal protection of the laws.**" (Emphasis added.)

It is undisputed that no additional burden has been imposed by non-residents on the Park District, thus raising serious questions under the Illinois Constitution of 1970 as to the unequal treatment of non-residents. Significant by its absence is any mention of the Illinois Constitution in the appellate court's opinion, even though the statute at issue was found unconstitutional under it. Not one word is used to attempt to show how a subdivision of the State (the Park District) can discriminate against state citizens based upon their residence when the State itself cannot do so under the Illinois Constitution. The appellate

court did not even discuss the residency issue even though it raises a stricter level of scrutiny. As the court stated in *Anderson v. Wagner*, 61 Ill. App. 3d 822, 378 N.E.2d 805, 809 (4th Dist. 1978), *affirmed* 79 Ill.2d 295, 402 N.E.2d 558 (1980), in discussing the tests to be applied in Equal Protection analysis:

> "The yardstick for measuring equal protection arguments has a number of sides. The traditional test for equal protection is not whether a statute results in unequal treatment, but whether the statutory inequality of treatment has a reasonable basis in fact. (*McGowan v. Maryland* (1961), 366 U.S. 420, 425-26.) A more exacting test known as the strict scrutiny test is employed in cases concerning 'suspect classifications' (*e.g.*, race, sex ethnic background, residency, and alienage) or 'fundamental interests' (*e.g.*, the right to travel freely or to practice a religion)." (Emphasis added.)

Here, where residency-based disrimination exists in an area well known for communities highly-segregated by both race and economic wealth, heightened scrutiny is called for. Furthermore, under Illinois law, the privilege of Illinois citizens to share equally the recreational resources of the state is a "fundamental" interest demanding more than cursory review. *See People ex rel. Scott v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773 (1977). *See also, Baldwin*, 436 U.S. at 395, 56 L. Ed. at 373 (Brennan, J., dissenting), *quoting* Mr. Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (N. 3,230) (CCED Pa. 1825).

In addition, Article IX, Section 2 of the Illinois Constitution of 1970 (the "Uniformity Clause" or "Uniform Fees Clause") provides as follows:

> "In any law classifying the subjects or objects of non-property taxes *or fees*, the classes shall be reasonable and the subjects and objects within each class shall be taxed *uniformly*." (Emphasis added)

The Uniformity Clause of Article IX, Section 2, where applicable, attaches a stricter standard of review than the Illinois Equal Protection Clause. *Searle Pharmaceuticals, Inc. v.*

Department of Revenue, 117 Ill.2d 454, 512 N.E.2d 1240 (1987). The appellate court should have applied the stricter standard of the Uniformity Clause to the Park District's practice of discriminating against non-residents, but failed to even consider the provision. The Park District charged a fee 25% greater to nonresidents that to residents, while admitting that there are no additional costs for supplying moorings to nonresidents than to residents. The Park District's actions thus violate Article IX, Section 2 of the Illinois Constitution, which provides further support for affirming the trial court's ruling on the surcharge and reversing the appellate court.

This Court, in *Searle Pharmaceuticals, Inc. v. Department of Revenue*, 117 Ill.2d 454, 512 N.E.2d 1240 (1987), explained in detail the Uniformity Clause's limitations on non-property taxes and fees. In *Searle*, this Court, after reviewing the history behind Article IX, Section 2 (117 Ill.2d at 468-69, 512 N.E.2d at 1245-46), held that "a broader limitation on the legislative power to classify for non-property purposes was intended to be included in the language of section 2 than the limitation of the equal protection clause." 117 Ill.2d at 469, 512 N.E.2d at 1246.

The non-resident surcharge cannot withstand scrutiny under even the rational basis test under the Equal Protection Clause employed by the appellate court, for the basis found by the court to support the discrimination is fallacious and illusory. The appellate court's basis was given as follows:

> "[W]here a local public entity has recreational resources which are finite, it has a justifiable interest in favoring the utilization of those resources by its residents over nonresidents." (Opinion p. 8.)

No authority is given by the appellate court for its above conclusion. Certainly there is none which will support it. The stated reason is fallacious, because it permits discrimination in *every* instance - since *all* recreational facilities and resources can be considered finite. It is illusory also because it ignores the strong public policy of this State, embodied in the Public Trust Doctrine, of preserving the natural resources of this State not just for a segment of its citizenry, but for all citizens equally.

Under any constitutional test the Park District residency discrimination fails to pass muster.

C. The Appellate Court's Opinion Is Contrary To The Illinois Public Trust Doctrine.

This Court, in *People ex rel. Scott v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773, 4 Ill.Dec. 660 (1977), discussed the history of the "Public Trust Doctrine" when it invalidated an enactment of the legislature based upon that doctrine. This Court cited as authority *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47 (1972) (which invalidated a beach fee where non-residents of a municipality were charged a higher fee than residents, although all users were citizens of the same state), when it stated that the use of "Lake Michigan is a valuable natural resource belonging to the people of this State in perpetuity," and that the use of said resource by the government "has to withstand a most critical examination." 66 Ill.2d at 79, 360 N.E.2d at 781. In *Scott*, this Court states as follows:

> " 'When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.' [Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich.L.Rev. 471, 490 (1970).] And it may be pointed out that, in considering what is the public interest, courts are not bound by inflexible standards.
>
> 'We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was

> created to benefit.' *Borough of Neptune City v. Borough of Avon-By-The-Sea* (1972); 61 N.J. 296, 309, 294 A.2d 47, 54-55, and cases and authorities cited therein; see also *Marks v. Whitney* (1971), 6 Cal.3d 251, 98 Cal.Rptr. 790, 491 P.2d 374." *Id.*

The Public Trust Doctrine is stated succinctly in 10 McQuillin on Municipal Corporations, Sec. 28.52, p.160:

> "Parks are for the benefit of, and are held in trust by the municipality for, the public."

As stated in 10 I.L.P. *Cities, Villages, and Other Municipal Corporations*, Sec. 1761:

> "The facilities of a park district, such as its parks and boulevards, are held for the general public or the People of the State at large, and not merely for those person residing in the park district or in the immediate vicinity of the park facilities."

The public trust doctrine has been cited with approval in numerous Illinois cases, dating back to 1896:

> (a) "It follows, therefore, that the park, swimming tank and gymnasium located therein are held for the use of the citizens of the State generally and not for the exclusive use of the citizens of the park district, and the ordinance which seeks to limit the use to the citizens of the district is null and void". (*Quinn v Irving Park District*, 207 Ill. App. 449, 457 [1917])
>
> (b) "The parks and boulevards owned and controlled by the park board are held for the use of the public generally, as well as for the public in their immediate vicinity. *West Chicago Park Commissioners v. The City of Chicago,* 152 Ill. 393". (*Basker v. West Chicago Park Commissioners*, 66 Ill. App. 507, 510 [1896]).
>
> (c) "The fact that the park district, as created by the act, is carved out of a particular section or portion of another municipality does not take from it the controlling feature of its public use. Its enjoyment and amusement are not limited to the particular park

> district, but are for the benefit, health and recreation of the public generally." (*Love v. Glencoe Park District*, 270 Ill. App. 117, 120 [1933]).
>
> (d) "It is clear from the foregoing authorities that all lands, the title to which is in commissioners of park districts, are held in trust for the equal benefit of all of the people of the State, that the facilities of park districts are for the equal benefit of all the people of the State and that park districts cannot operate their facilities or permit them to be operated in such a manner that a preferential use thereof is granted to any one person or to any group of persons." (*Lincoln Park Traps v. Chicago Park District*, 323 Ill. App. 107, 114, 55 N.E.2d 123 [1944]).

The effect of the appellate court's ruling is to emasculate the Public Trust Doctrine, and to replace it with a system akin to feudalism, whereby the privilege to use a particular park or facility becomes an incident of one's birth. Moreover, it encourages park districts across the State to build Great Walls of discrimination around each district, to keep out the non-resident infidels, who are not worthy to share equally the privileges to which the residents were accidently born.

D. The Opinion Of The Appellate Court Is Contrary To 92 Years Of Illinois Case Law Prohibiting Discrimination Based On Residency.

The leading case in Illinois holding that nonresidents may not be discriminated against by being charged higher fees is *City of Elgin v. Winchester*, 300 Ill. 214, 133 N.E 205 (1921). In that case a $300 fee was levied on nonresidents distributing advertisements. Residents were charged no fee. This Court held the ordinance invalid and went into the subject of discrimination in detail on pages 216 and 217 as follows:

> "In our judgment, under the authorities, the ordinance is void as being discriminatory between residents and nonresidents as to the payment of license fees. A citizen of the city may procure a permit without the payment of a license fee and distribute advertisements concern-

> ing sales by such citizens. Beyond question the ordinance permits local merchants to advertise by the distribution of circulars or pamphlets. **A statute or ordinance which in imposing a license tax discriminates in favor of the residents of a State or city and against non-residents of the same class is unconstitutional.** (*McGraw v. Town of Marion*, 98 Ky. 673; *Eales v. City of Barbourville*, 177 id. 216; *State of North Carolina v. Williams*, 158 N.C. 610; 40 L.R.A. (N.S.) 279, and cases cited in note; *City of Saginaw v. Circuit Judge*, 106 Mich. 32; *Clements v. Town of Casper*, 4 Wyo. 494; 25 Cyc. 610; 17 R.C.L. 510; 2 Dillon on Munc. Corp. Sec. 593, and cases cited in note; 2 McQuillin on Munc. Corp. Sec. 739; *Ward v. Maryland*, 79 U.S. 418; *Ex parte Thornton*, 12 Fed. 538.) While this court seems never to have had this precise question before it for consideration, its reasoning in cases where similar principles are involved would tend to uphold the conclusions of the decisions above cited from other States. (*City of Carrollton v. Bazzette*, 159 Ill. 284; *City of Monmouth v. Popel*, 183 id. 634; *Tugman v. City of Chicago*, 78 id. 405.) While other cases have been cited by appellee as supporting the validity of the ordinance we do not consider them controlling. By reason and the great weight of authority the conclusion must be reached, in our judgment, that the provision in question under which the fine was entered against appellant renders the ordinance discriminatory and therefore void." (Emphasis added)

The rule was reaffirmed in *American Baking Co. v. City of Wilmington*, 370 Ill. 400, 19 N.E.2d 172 (1938), and in *Larson v. City of Rockford*, 371 Ill. 441, 21 N.E. 2d 396 (1939), at page 445 as follows:

> "Arbitrary discrimination between residents and nonresidents in the issuance of licenses or the fees charged will invalidate a municipal ordinance. . . "

Numerous decisions before the *City of Elgin* case had struck down ordinances favoring residents. *E.g., Village of Braceville v. Doherty*, 30 Ill. App. 645 (1889); *Lucas vs. City of Macomb*,

49 Ill. App. 60 (1892); *City of Carrollton v. Bazzette*, 159 Ill. 284 (1896).

Because of its inclusion in A.L.R. and adoption by this Court in *People Ex. Rel Scott v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773, 4 Ill.Dec. 660 (1977), the leading case nationally on this subject is *Borough of Neptune City of Borough of Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47, 57 A.L.R. 3d 983 (1972). In that opinion the court considered the subject at length and stated:

> "We are convinced it has to follow that, while municipalities may validly charge reasonable fees for the use of their beaches, they may not discriminate in any respect between their residents and nonresidents." (57 A.L.R. 3d 994)

Supporting the doctrine that nonresident citizens of the same state may not be discriminated against are two recent cases holding the Illinois Preference Act to be unconstitutional. The Preference Act (Ill. Rev. Stat. Ch. 48, para. 39s - 1 et seq.) provided that only Illinois laborers would be used on state or other governmental construction contracts. The Act was contested in both the federal and the state courts. In the federal case, *W.C.M. Window Co., Inc. v. E. Allen Bernardi*, 730 F.2d 486 (7th Cir. 1984), the Court of Appeals held that the law violated both the commerce clause and the privileges and immunities clause of the United States Constitution. It went so far as to say that the law suffered from "prima facie invalidity." In the state case this court also found the law to be violative of the privileges and immunities clause. *People ex rel. Bernardi v. Leary Construction Company, Inc.*, 102 Ill.2d 295, 464 N.E. 2d 1019, 80 Ill.Dec. 36 (1984).

Both cases resoundingly condemned residency-based discrimination, even in a situation where there was no public trust doctrine applicable to the government involved - as there is here with park district property. Sanctioning residency discrimination is contrary to the case law of Illinois.

E. The State Statute Which Authorizes That Fees Charged To Nonresidents Need Not Be The Same As Residents Must Be Interpreted To Mean That The Fees May Be Larger Only If Additional Burdens Are Imposed On The Park District As A Result Of Nonresident Usage.

The trial court struck down as unconstitutional and void Section 333.23n(g) of the Chicago Park District Code, which reads as follows:

> "The Chicago Park District, to carry out the purposes of this section, has all the rights and powers over its harbor as it does over its other property, and its rights and powers include but are not limited to the following:
>
> * * *
>
> (g) To establish and collect fees for all facilities and services, and compensation for materials furnished. **Fees charged non-residents of such district need not be the same as fees charged to residents of the district.**" Ill. Rev. Stat., ch. 105, Sec. 333.23n(g) (1987) (emphasis supplied).

The Park District relies on this statute for authority for charging non-residents more than residents for mooring permits. However, in the case at bar the Park District has admitted that the cost of providing non-resident moorings is the same as providing resident moorings, and has coupled that admission with the admission that it makes a huge profit even on resident's mooring permit fees; thus, there is no rational basis for the 25% surburban surchage. A state statute cannot overrule the constitutional provisions mandating that citizens not be treated unequally without a rational basis.

It is a long-standing doctrine that if at all possible, a statute must be interpreted as being in accord with constitutional provisions; if it cannot, then it must be struck down as unconstitutional. As stated in *Douglas v. Village of Melrose Park*, 389 Ill. 98, 101, 58 N.E. 2d 864, 865 (1945):

> "Legislative enactments should be construed in a

> manner which will prevent their running counter to constitutional provisions."

Thus, in order for the statute permitting fees to be charged to nonresidents at a different rate from residents, to be constitutional on its face, it must be interpreted to mean that nonresidents can be charged more only if the Park District incurs additional burdens as a result of their usage of the facilities. To interpret the statute otherwise would not be in accord with prior case law (*Williams v. City of Chicago*, 66 Ill.2d 423, 362 N.E.2d 1030 [1977]) and the constitutional principles enunciated in the cases holding that nonresidents cannot be charged more that residents. Even under such an interpretation of the statute, which plaintiffs urge the Court to adopt, the above-cited statute is unconstitutional as applied to plaintiffs. The Park District's practice of charging non-residents a surcharge fee for a mooring permit cannot stand where there is absolutely no basis for the surcharge.

Plaintiffs point out that although the above statute applies only to the Chicago Park District, this issue affects the entire state through the Illinois Park District Code, applicable to all other park districts within the state. Section 8-1 of that Code provides:

> "Every park district shall . . . have and exercise the following powers:
>
> * * *
>
> (h) To establish fees for the use of the facilities of the district. **Fees charged non-residents need not be the same as fees charged to residents of the district.**" Ill. Rev. Stat. ch. 105, sec. 8-1(h) (1987) (emphasis supplied).

This Court must make a clear pronouncement to the entire State the arbitrary discrimination against non-residents based on these statutes shall not be tolerated. Each park district may impose a surcharge upon non-residents for the use of park district facilities only on the basis of an additional burden imposed by the non-residents.

F. The Park District's Own Ordinances Prohibit Discrimination: Fees Must Be Uniform.

The additional(non-uniform) charge imposed on nonresidents is in direct contravention of the Park District's own code. The higher charge is mentioned in the Schedule of User Fees of the Park District in the budget of each year and carries the following footnote on all Marine Fees (R. 482 et seq.)

> "A non-resident surcharge of 25% of the base fee is assessed on all permits issued to boaters residing outside the City of Chicago."

No ordinance of the Chicago Park District exists which authorizes a 25% higher fee for non-residents. Contrary thereto, Sec. 30-8 of the Chicago Park District Ordinance provides as follows (R. 186):

> "The Park Board or the General Superintendent may fix and collect reasonable fees for the use of park facilities. Such fees may be fixed at a *uniform* rate to all users of such facility or facilities." (Emphasis added.)

Thus, a non-resident surcharge of 25% additional fee is not in the ordinance, is contrary to the Park District's own ordinances, and yet the appellate court failed to even discuss this mandate of uniformity.

G. The Same Panel Of The Appellate Court Has Issued An Opinion Exactly Opposite To Its Opinion In This Case.

Two months prior to its decision here, the appellate court (in fact, the same Division, per Justice McNamara, with Justices Rizzi and Freeman concurring) affirmed a trial court's summary judgment in a class action striking down a surcharge imposed by the City of Chicago's Metropolitan Sanitary District on non-resident users of the system, because (i) the charges were unreasonable, and (ii) the charges were discriminatory. Stated the appellate court in *Bobrowicz v. City of Chicago*, 168 Ill. App. 3d 227, 522 N.E.2d 663, 669, 119 Ill. Dec. 1, 7 (1988):

> "The result of the surcharge is to impose upon residents

> of unincorporated areas a 50 percent higher rate than that charged residents of Chicago, or residents of municipalities to whom Chicago sells water. This, in our estimation, is an arbitrary imposition of a surcharge on the plaintiff class and clearly in violation of defendant's common law duty not to charge unreasonable or discriminatory rates."

Inexplicably, the same panel ignored its own prior case law, i.e., the common law duty (Illinois Public Trust Doctrine in this case) and the Illinois constitution, in writing its opinion in this case. The arbitrariness condemned by the appellate court in *Bobrowicz* cannot be countenanced in this case.

III.

THE COURT ERRED IN HOLDING THAT THE CHICAGO PARK DISTRICT CAN MAKE A PROFIT ON ITS NON-BONDED FACILITIES.

The Chicago Park District has not been given the power to raise revenue through mooring fees by the general assembly and is precluded from assessing taxes on the harbor or its personal property. Ill.Rev.Stat ch. 105, sec.333.23(p). Since they are a limited unit of local government, without the state authority to raise revenue through mooring fees, it is irrelevant whether the fees charged are called permit fees or "implied rent" (profits by definition are taxes). Stated this Court in *Ward Baking Co. v. City of Chicago*, 340 Ill. 212, 214, 172 N.E. 171 (1930):

> The city has no power to exact such a license fee solely for the purpose of raising revenue. In the exercise of police power for the purpose of regulation the authority of a municipality **is limited to such a charge for a license as will bear some reasonable relation to the additional burdens imposed upon the municipality by the business or occupation licensed and the necessary expense involved in police supervision.** [Citations.]"

Regardless of the nomenclature, the Chicago Park District is precluded from raising revenue by this means and thus the 500% profit is illegal. The mooring permit fees should be "limited to such a charge . . . as will bear some reasonable relation" to the

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POINTS AND AUTHORITIES

PLAINTIFFS' COMBINED REPLY BRIEF TO BRIEF AND ARGUMENT FOR DEFENDANT-RESPONDENT, BRIEF OF THE ILLINOIS MUNICIPAL LEAGUE AND BRIEF OF THE ILLINOIS ASSOCIATION OF PARK DISTRICTS. 1

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III.

THERE IS NO JUSTIFICATION FOR CHARGING NONRESIDENTS A GREATER FEE THAN RESIDENTS FOR THE SAME SERVICES.

The Park District devotes almost 60 percent of its brief to defending its surcharge on nonresidents. It never comes to grips with the rule in this State parks are for all the citizens of the state, not for just the residents of the district.

A. The Park District Receives State Funds And Is Therefore Supported By Nonresidents.

The Park District's argument that the residents of Chicago solely support the District's activities and facilities and should therefore be able to discriminate against non-residents of Chicago because they do not support the activities of the Park, flies in the face of the amount the Park District receives from the State of Illinois Personal Property Replacement Fund (Ill..Rev.Stat. ch 85, Sec. 616), which in 1983 amounted to $9,164,152, as contrasted with the $3,402,113 the the Park received from its harbor operations (R. 432, "Comptroller of the Chicago Park District Annual Report 1983", p. 17). Since this tax is collected state wide and taxing districts in Cook County receive 51.65% of the proceeds of the tax, all nonresidents of the Chicago Park District subject to the Personal Property Replacement Tax subsidize the Chicago Park District each and every year just as if their real estate were taxed in Cook County. The Chicago Park District is directly and indirectly financially supported by nonresidents of Chicago.

B. The Park District's Arguments Are Bottomed On Specious Foundations.

There are several dominant and recurring themes that pervade the arguments of the CPD that are specious.

(1) This case does not deal with scarce resources.

In an attempt to bring this case under *Baldwin v. Montana Fish and Game Commission of Montana*, 436 U.S. 371 (1983), the CPD claims that its harbors and facilities are "scarce" and "limited." Disregarding the interstate aspects of *Baldwin*, there

are two things wrong with this claim. First, there is nothing in the record to show it to be true. (Contrast that with the evidence produced in *Baldwin*.) Second, it is just not true. Harbors are not wasting assets. They use up only a minute fraction of the shore space available to the Park District. There are unused miles and miles of potential harbors. As this Court stated in *Chicago Park District v. City of Chicago*, 111 Ill.2d 7, 488 N.E.2d 968, 972 (1986) "This [a decrease in the waiting list] was accompanied, however, by a steady increase in the number of moorings available from 3,674 in 1978 to 5,090 in 1983." This growth is continuing. Plaintiffs ask the court to take judicial notice of the CPD's Director of Harbors announcement, circulated to the class members, that the Chicago Park District is adding a new Turning Basin Marina and has plans for additional harbors (Appendix B attached hereto, p.2). Rather then being scarce and limited facilities, CPD moorings are an expanding asset.

(2) Levying a surcharge on nonresidents is the same as denying use of the facilities.

One of the Park District's more pervasive sophistries is its insistence that it is not denying or limiting access to its facilities by requiring a nonresident to pay a 25% surcharge over the fee charged residents. By the District's own admission, one (and the predominant one) of the purposes of its own surcharge is to exclude nonresidents. On pages 56 to 58 of its brief the Park District tells us the extra fee will not deny nonresidents the use of its facilities. On pages 34 to 37, though, it argues that the surcharge does just exactly that, to wit: It protects residents from not having the facilities available to them because nonresidents have crowded them out. According to the caption, the surcharge is a "rational means of preserving scarce recreational amenities for the benefit of the District's residents." (CPD, p.34) The Park District's arguments have the consistency of an archer with the hiccups.

The Park District's argues that "history" has shown that it has not happened. (CPD, p.44) All "history" is not in the record in this case. If it were, it would show that the opposite were true: that it is becoming a common practice for park districts to attempt to exclude nonresidents by imposing higher fees on them, as an article from the Chicago Tribune of February 15,

1987, attached hereto as Appendix C. shows, giving lie to the Park District's statement. Lake Forest has beaches and wants to make sure nonresidents don't use them; they therefore require a $750 fee from nonresidents. As the article states:

> "City officials in Lake Forest are up front about their motives for planning to charge 15 times what they used to charge for lakefront parking: They don't want outsiders cluttering up their nice new beach."

Further giving lie to the "historical" answer of the Park District are the amici briefs. The IAPD admits that 95% of the park districts in Illinois (p.8) discriminate against nonresidents and both amici want this court to approve residency discrimination.

C. The Park District's Arguments And Law Are Misleading And Erroneous.

The CPD has cited in its brief a number of cases not cited by Plaintiffs. Because these decisions' factual foundations are substantially and meaningfully distinguishable, their stated rationale do not stand as conflicting authority from Plaintiffs' positions.

(1) The Park District Misstates The Holding And Reasoning Of The Camden Case.

The Park District deliberately quotes from *United Building and Construction Trades Council v. City of Camden*, 465 U.S. 208 (1984), out of context to make it appear that *Camden* says something that it does not. On page 30 of its brief the District says:

> "Such discrimination [by a state against nonresidents] can be attacked only 'at the behest of out-of-state residents.'" 465 U.S. at 218.

The quoted phrase is lifted from language that said something completely different. The omitted language preceding the CPD's quotation is:

> "We conclude that Camden's ordinance is not immune from Constitutional review at the behest of out-of-state

residents merely because some in-state residents are similarly disadvantaged." *Id.*

As the full quotation shows, the quote by the CPD does not at all support the meaning of *Camden*. The quotation does buttress the meaning of the case as posited by Plaintiffs, however. It is encapsulated in another quotation from the case:

> "A person who is not residing in a given state is *ipso facto* not residing in a city within that state. Thus whether the exercise of a privilege is conditioned on state residency or on municipal residence he will just as surely be excluded." (79 L.Ed. at 257.)

In support of its misleading interpretation of *Camden*, the District cites (p. 30) *Association of Data Processing Service Organization vs. Camp*, 397 U.S. 150, 153 (1950). Its bearing on the instant case is nonexistent.

(2) The Park District Misstates The Holdings Of The Cases Cited Under The Equal Protection Clause.

The Park District cites five Illinois cases and two federal cases on pages 32 to 34 of its brief to support its argument that the discrimination against nonresidents is supported by the Equal Protection Clause. None do so.

Jenkins vs. Wu, 102 Ill.2d 468 (1984), dealt with the right of access to medical files and is irrelevant, both in facts and law. The *Illinois Housing Development Authority v. Van Meter*, 82 Ill.2d 116 (1980), case is even wider of the mark. It dealt with the State Housing Development Act's eligibility requirement that was based on wealth. The *Gilligan v. Korzen*, 56 Ill.2d 387 (1974), case dealt with a motor vehicle tax on residents of unimproved areas of a county where the levying authority was home rule unit and the tax was within the powers granted it. The court rested its decision on the *Heartt v. Village of Downers Grove*, 278 Ill. 92 (1917). Both *Gilligan* and *Heartt* support Plaintiffs' position in this case. *City of Chicago v. Vokes*, 28 Ill.2d 475 (1963), case is merely one of a long series of taxicab cases that have dealt with the prosecution of a taxicab driver who was not licensed in Chicago, but picked up a customer in Chicago.

> considerable skepticism upon **any** governmental conduct which is calculated **either** to reallocate that resource to more restricted uses **or** to subject public uses to the self-interest of private parties." [emphasis in originals, *Paepcke v. The Public Building Commission of Chicago*, 46 Ill.2d 330, 263 N.E.2d 11, 16 (1970); *People Ex Rel. Scott v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773, 780, 4 Ill.Dec. 660, 667 (1976)]

The CPD ignores the relevant aspect of the doctrine: reallocating public resources to more restricted uses. The CPD is violating the first restriction by reallocting the mooring facilities from the general public to the residents of the CPD. Not one authority cited by the CPD supports its contention that it can promote its own residents over nonresidents. See discussion of *Paepcke* at page 4 of this reply.

The CPD cites, at pp. 54-56, intermediate-level New Jersey case law as authority for the supposed proposition that the Public Trust Doctrine does not extend to the use of man-made facilities. However, both *Van Ness v. Borough of Deal*, 145 N.J.Super. 368, 367 A.2d 1191 (1976), and *Hyland v. Borough of Allenhurst*, 148 N.J.Super. 437, 372 A.2d 1133 (1977), cited and relied on by the CPD were reversed by the Supreme Court of New Jersey, based on the Public Trust Doctrine established in *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 J.J. 296, 294 A.2d 47 (1972). *See Van Ness*, 78 N.J. 174, 393 A.2d 571 (1978); *Hyland*, 78 N.J. 190, 393 A.2d 579 (1978). Other cases have applied the Public Trust Doctrine to public lands *including any improvements thereon. See, e.g., Quinn v. Irving Park District*, 207 Ill.App. (1917); *Gewirtz v. City of Long Beach*, 330 N.Y.S.2d 495 (1972) (citing *Neptune City*).

The CPD cannot avoid the application of the Public Trust Doctrine which invalidates their discriminatory surcharge on non-residents.

(5) The Use Of The Word "May", In The Park District's Ordinances, Must Be Read As Mandatory, Not Permissive.

The CPD's assertion that its Sec. 30-3 controls the amount that can be charged (CPD, p.59) is in error. The ordinance says nothing concerning the amount of the fee or how it is to be assessed, all of which is covered in Sec. 30-8. The CPD cites no authority for its assertion that the word "may" in Sec. 30-8 is permissive. Contrary thereto, the word "may" is mandatory in Sec 30-8, requiring that fees be uniform to all users and reasonable in amount. The sentence would otherwise make no sense since "permission" is always available to those setting the fees. Under the case law the word is mandatory, otherwise the sentence would have to be considered superfluous. *Village of Woodridge v. Bohnen Intern., Inc.*, 60 Ill.App. 3d 692, 17 Ill.Dec. 931, 933, 377 N.E.2d 121 (1978); *Figures v. Swank*, 128 Ill. App. 2d 211, 263

Neither of the two federal cases is any more relevant than the five Illinois cases.

(3) There is no support in the cases cited for the proposition that courts have sustained the right to impose a surcharge on nonresidents.

The Park District cites three U.S. Supreme Court cases as support for its right to impose a surcharge on nonresidents. These are *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371 (1977), *Martinez v. Bynum*, 461 U.S. 321 (1983), and *Vlandis v. Kline*, 412 U.S. 441 (1973). *Baldwin* has already been discussed at length.

The issue in *Vlandis* was not whether a right to discriminate had taken place, but whether an irrebuttable presumption of nonresidence was valid. The quotation printed by the Park District was actually part of what the court was careful to emphasize was *not* being decided in the case. The line immediately following the words quoted is:

> "We hold only that a permanent irrebuttable presumption of nonresidence . . . is violative of the Due Process Clause . . . ."

Thus *Vlandis* did not deal at all with the issues in this case. Nor did *Martinez*. The parents of Martinez lived in Mexico and Martinez left to live with his sister in Texas in order to go to school. The question was whether Texas could exclude him from the in-state tuition rates. The court held it could, but the case does not support the right of a park district to impose a surcharge on residents of other communities within the same state.

Nor do either of the two lower holdings (in California and New York) cited on page 36 of the CPD's brief support this position. In fact *McClain v. South Pasadena*, 318 P.2d 199 (Cal. App. 1957) permitted total exclusion of nonresidents from the park facilities which is contrary to Illinois Law. *See Quinn v. Irving Park District*, 207 Ill.App. 449 (1917).

The CPD cites two other tuition residency cases on page 38. Both of them were concerned with the definition of "resi-

dency", not the reasonableness of the fees. However, in *Sturgis v. Washington*, 368 F.Supp. 38 (N.D. Wash. 1970) (three-judge court), *summarily affirmed* 414 U.S. 1057 (1973), we find the court concerned with whether the nonresident was being overcharged, and the court found that nonresidents were not being charged more than their share of expenses:

> "[T]he only evidence before this court which relates to the actual cost of higher education in the State of Washington shows that the fees for a non-resident student are directly related to the cost of educating that student. Thus, the non-resident student merely pays his way and no penalty can correctly be said to have attached to the non-resident status."

See also Johns v. Redeker, 406 F.2d 878 (8th Cir. 1969) (same holding as *Sturgis* - non-resident students merely paying the per pupil cost of education).

The Illinois cases cited by the CPD — *Fagiano v. Police Board of the City of Chicago*, 98 Ill.2d 277 (1983), *Bastian v. The Personnel Board of City of Chicago*, 98 Ill.2d 277 (1983), and *Harvey Firemen's Association v. City of Harvey*, 75 Ill.2d 358 (1979) — similarly did not deal with the issues of this case. Both *Fagiano* and *Bastian* dealt with whether residency requirements were definite or ambiguous. In both, the courts held that the requirements contained sufficient standards to meet Illinois law. The issue in *Harvey* was what powers had been granted by the General Assembly and is obviously unrelated to the issues in this case.

(4) The Public Trust Doctrine In Illinois Prohibits The Park District From Imposing A Surcharge On Nonresidents.

The CPD attempts to evade the Public Trust Doctrine by focusing on an irrelevant aspect of the doctrine: ceding ownership of public land to private interests. There is more than one aspect to the Public Trust Doctrine in Illinois. The public trust doctrine as enunciated by this court is as follows:

> "When a state holds a resource which is available for the free use of the general public, a court will look with